

Exhibit 9

V I R G I N I A :

IN THE CIRCUIT COURT
FOR THE CITY OF ROANOKE-----
SHARON G. WINGATE,
Executor of the Estate of
DOUGLAS GRAY WINGATE,
Deceased,

Plaintiff,

vs.

INSIGHT HEALTH CORP.,

Defendant/
Cross-Claim Defendant,

vs.

JOHN M. MATHIS, M.D., ROBERT
F. O'BRIEN, M.D., and IMAGE
GUIDED PAIN MANAGEMENT, PC,Defendant/
Cross-Claim Plaintiff, :

Case No. : CL12-2547

APRIL 5, 2013
10:00 A.M.HEARD BEFORE:
THE HONORABLE CHARLES N. DORSEYCENTRAL VIRGINIA REPORTERS
P.O. BOX 12628
ROANOKE, VA 24027
(540) 380-5017

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Whereupon, the following cause came to be heard
before the Honorable Charles Dorsey, Judge of the Circuit
Court of Roanoke, Virginia, sitting in Roanoke, Virginia, on
the 5th day of April, 2013, in the presence of those listed
under "Appearances" on Page 2 herein.The Court Reporter, Cynthia N. Stiles, CCR, was
duly sworn.

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APPEARANCES:

GENTRY, LOCKE, RAKES & MOORE
Roanoke, Virginia
BY: J. SCOTT SEXTON, ESQ.
DANIEL SULLIVAN, ESQ.

Counsel on behalf of the Plaintiff

LECLAIR RYAN
Roanoke, Virginia
BY: NANCY REYNOLDS, ESQ.
MICHAEL P. GARDNER, ESQ.
Counsel on behalf of Dr. Mathis,
Dr. O'Brien, and Image Guided Pain
ManagementBONNER, KIERNAN, TREBACH & CROCIATA
Washington, DC
BY: CLINTON R. SHAW, JR., ESQ.
Counsel on behalf of Insight Health
Corporation

* * * * *

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1 (10:35 a.m.)

2 PROCEEDINGS

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4 THE COURT: All right. In no particular
5 order, we have circuit court civil file, and these
6 are all city cases being heard in the City:
7 CL13-0057, Smith versus Mathis and others;
8 CL13-0055, Harris versus Insight and others;
9 CL13-0009, Foutz versus Insight and others;
10 CL12-2571, Epperly versus Insight and others.11 Just for the purpose of getting to it: We
12 also have CL12-2547, Wingate versus Insight and
13 others; CL12-2573, McFarlane versus Insight and
14 others; CL12-2574, Kalinoski versus Insight and
15 others; CL12-2575, Filson versus Insight and
16 others; CL12-2576, Bradley versus Insight and
17 others; and CL12-2572, Smith versus Insight and
18 others.19 First of all, are there any -- And I have the
20 oath of the Court Reporter, and it's been entered
21 as to all those matters for the purposes of today's
22 hearing.23 What I'd like to do is get each counsel to
24 identify themselves on the record, announce whether

<p style="text-align: right;">5</p> <p>1 they're ready or not, announce who they represent, 2 and specifically let me know if there are any other 3 files that should have been read that were not 4 included for the purposes of this hearing that you 5 think are included. And let me start, Mr. Sexton, 6 with you. 7 MR. SEXTON: Yes, Your Honor. Scott Sexton 8 and Dan Sullivan from Gentry Locke, representing 9 the Plaintiffs in each of the cases that you named. 10 I tried to keep a careful listen, but did you 11 name the matter CL13-0054, which is Whitlow versus 12 Insight? 13 THE COURT: I do not think I did. 14 MR. SEXTON: The Court Reporter is indicating 15 that you did not; and so that's an additional case 16 that is set for hearing today as well on a motion 17 for partial summary judgment. 18 THE COURT: All right. If I need that, I'll 19 have it brought in. Otherwise, I assume that these 20 issues are shared by all or most of these, 21 dependent upon the issue. 22 MR. SEXTON: They're identical in each case. 23 THE COURT: All right. So 13, what was it, 24 0054?</p>	<p style="text-align: right;">7</p> <p>1 MR. SHAW: Your Honor, Clinton R. Shaw, Jr. on 2 behalf of Insight Health Corp. 3 THE COURT: All right. 4 MR. SHAW: And the only thing I would add, 5 Your Honor, is I don't believe the Wingate case is 6 before the Court anymore. 7 THE COURT: Okay, and just knowing that we've 8 all discussed this, but just for the record, would 9 you briefly state why you believe that to be the 10 case? 11 MR. SHAW: Yes, Your Honor. Last night we 12 filed a notice of removal to the Western District 13 of Virginia electronically, and this morning that 14 was perfected by a notice to the Clerk of the 15 notice of removal at 9:10 a.m. this morning. It's 16 effectively removed to that court. 17 THE COURT: All right. And I believe I 18 understood in the very, very brief -- it wasn't a 19 pretrial conference, it wasn't really even hardly a 20 conference, but a very brief discussion off the 21 record just prior to going on the record that Miss 22 Reynolds, you would beg to differ with that, and I 23 think Mr. Sexton you would too. Is that correct? 24 MR. SEXTON: Yes, Your Honor.</p>
<p style="text-align: right;">6</p> <p>1 MR. SEXTON: Yes, sir. 2 THE COURT: Is also included. 3 MR. SEXTON: Right. That's Richard A. Whitlow 4 versus Insight and others. 5 THE COURT: I'm sorry, your co-counsel is? 6 MR. SEXTON: Daniel Sullivan. Goes by Dan. 7 THE COURT: And I know Mr. Sullivan, but I've 8 reached an age where if I have more than one file, 9 I sometimes forget names. 10 MR. SEXTON: I'm right with you. 11 THE COURT: No offence intended, Mr. Sullivan. 12 Thank you. 13 All right, Miss Reynolds? 14 MS. REYNOLDS: Your Honor, Nancy Reynolds here 15 for John M. Mathis, MD, Robert F. O'Brien, MD, and 16 Image Guided Pain Management, PC. 17 THE COURT: And do we have all the files that 18 you think we're supposed to have? 19 MS. REYNOLDS: Yes, sir. 20 THE COURT: And Mr. Gardner, you're with Miss 21 Reynolds? 22 MR. GARDNER: Yes, sir, on behalf of the same 23 Defendants. 24 THE COURT: And Mr. Shaw?</p>	<p style="text-align: right;">8</p> <p>1 MS. REYNOLDS: Yes, sir. 2 THE COURT: We'll hear from you first, Miss 3 Reynolds. 4 MS. REYNOLDS: Well, I believe Mr. Gardner is 5 the one more qualified to respond to that. 6 THE COURT: I'll be happy to hear from Mr. 7 Gardner. 8 MR. GARDNER: Thank you, Your Honor. 9 Our understanding of the removal, not having 10 seen it at this point, is that the grounds for 11 removal are not diversity of citizenship nor 12 federal question, which are the two valid grounds 13 to remove a case. 14 Instead, the ground is stated as an acceptance 15 of an invitation by the bankruptcy trustee for the 16 New England Compounding Clinic to bring the state 17 matters into federal court in the District of 18 Massachusetts. 19 The trustee for NECC has moved the District of 20 Massachusetts to consolidate a number of actions, 21 including state actions where NECC is not a named 22 party, into the District of Massachusetts in Boston 23 for consolidation. 24 We would argue that that is a motion for a</p>

<p style="text-align: right;">9</p> <p>1 court to issue a ruling upon. It is not an 2 invitation for a party to accept. Even if it were 3 an invitation for a party to accept, the proper 4 means of acceptance would not be to remove the case 5 to the Western District of Virginia. This seems 6 instead a tactic designed to delay a hearing, on 7 the eve of the hearing.</p> <p>8 THE COURT: Okay. Mr. Sexton?</p> <p>9 MR. SEXTON: Your Honor, I agree. I agree 10 with what Mr. Gardner has said. To put -- I was 11 intending at some point today to tell the Court 12 about what has been going on in the federal cases.</p> <p>13 As you know -- I believe you know -- Mrs. 14 Wingate and all the other Plaintiffs in the initial 15 wave of these cases, she filed a case separately 16 against New England Compounding, a federal case in 17 federal court in Roanoke.</p> <p>18 That case has been removed as part of a 19 multidistrict litigation panel, and it's going to 20 be heard up in the district court sitting in 21 Boston. So that is, that's all exactly going 22 according to how it should.</p> <p>23 In the meantime, New England Compounding has 24 filed for Chapter 11 bankruptcy in the Boston</p>	<p style="text-align: right;">11</p> <p>1 very bold motion. It seeks to expand the authority 2 of the bankruptcy court far beyond what it has 3 traditionally held, to have state court claims 4 against nondebtors -- solely against nondebtors. 5 Bear in mind New England is not a party here -- but 6 solely against nondebtors and try to bring those 7 all into federal court.</p> <p>8 I was on a conference call, the very week 9 after this occurred the judge had a conference 10 call, and he invited us all to be there and have 11 all the cases in the nation. There are only 15 12 listed that had only nondebtor defendants that the 13 trustee had listed. We were 11 of those.</p> <p>14 And so not surprisingly the judge commented 15 that he did not believe -- It was a hearing that 16 we participated in by conference call, and the 17 judge did comment that he did not believe he had 18 the jurisdiction over a pain management clinic in 19 Roanoke, Virginia. So out of all the ones in the 20 nation, he made that comment.</p> <p>21 So in response to that he set up a briefing 22 schedule, and he told all the parties to brief by 23 April 16. We briefed well in advance of that. I 24 think we filed ours on March 19. We filed a motion</p>
<p style="text-align: right;">10</p> <p>1 bankruptcy court. Recently the trustee in that 2 case sought to, did file the motion that Mr. 3 Gardner mentioned, asking the district court judge 4 to issue an order transferring --</p> <p>5 THE COURT: Which district court judge?</p> <p>6 MR. SEXTON: Saylor.</p> <p>7 MR. GARDNER: Judge Saylor of the District of 8 Massachusetts.</p> <p>9 THE COURT: I'm sorry, I did phrase it as to 10 the identity of the judge. I really meant which 11 district. So Massachusetts.</p> <p>12 MR. SEXTON: Right, a Massachusetts judge 13 under the bankruptcy rules, which are kind of 14 different for us used to state court practice.</p> <p>15 But the bankruptcy court rules allow the 16 district court sitting in the district in which the 17 bankruptcy is proceeding to handle all of that; 18 because as you probably remember, the bankruptcy 19 court sits deriving its authority from the --</p> <p>20 THE COURT: It's not an Article III court.</p> <p>21 MR. SEXTON: Right -- district court anyway. 22 So he can just withdraw the reference, and then he 23 sits there and hears that.</p> <p>24 So the trustee has made a motion. It is a</p>	<p style="text-align: right;">12</p> <p>1 for extension and a large brief.</p> <p>2 Basically our points in that are that in a 3 state court only case that is already proceeding 4 and can be tried expeditiously, the Court must 5 abstain.</p> <p>6 And then secondarily, the Court has no 7 jurisdiction against nondebtors, like the doctors. 8 Dr. Mathis and Dr. O'Brien, they've never been to 9 Boston to do business. They do business in 10 Roanoke. They're entitled to have a Roanoke jury 11 hear their case.</p> <p>12 So all those issues are up there. And then 13 there's, in addition to whether he has jurisdiction 14 or not, which this would be a huge expansion, then 15 he can also voluntarily abstain, just in the 16 interest of fairness and what he thinks is right.</p> <p>17 So it's entirely up to him, and no court 18 sitting in the Western District of Virginia can 19 force him to take a case. His permission has been 20 sought, and he has told us that he wants briefing 21 on it, and he'll make that decision in May or June 22 probably.</p> <p>23 And I think there's a very, very low 24 likelihood that he is going to yank the state</p>

<p style="text-align: right;">13</p> <p>1 course cases from Virginia and put them up there in 2 Boston on his already crowded docket. But that's 3 the "invitation" to which Mr. Shaw has responded by 4 filing a notice of removal. 5 THE COURT: And the notice of removal, Mr. 6 Shaw, is to the Western District? 7 MR. SHAW: Yes, sir. 8 THE COURT: Of Virginia? 9 MR. SHAW: Yes, sir. 10 THE COURT: All right. 11 MR. SEXTON: And we have not received a copy 12 of the notice. 13 THE COURT: I understand. I haven't either. 14 MR. SEXTON: And neither did Miss Reynolds or 15 her clients. So we are operating somewhat in the 16 dark as to that issue. But as you'll probably 17 recall, removal in federal court requires that you 18 act within a certain number of days. My 19 recollection is it's 30. And in this instance -- 20 THE COURT: My recollection is that the 21 federal rules have changed, in the 11 years I 22 haven't been practicing. 23 MR. SEXTON: But my recollection is 30, and I 24 think somebody will correct me, if I'm wrong.</p>	<p style="text-align: right;">15</p> <p>1 else, we get no notice of this until today? 2 I can tell the Court this is at some degree of 3 personal sacrifice. As I believe you're aware, 4 there's been a lot of personal medical problems in 5 my family this week, and we've been dealing with 6 that. But yet -- And thankfully everything is 7 going well. 8 THE COURT: Good. 9 MR. SEXTON: But to prepare for this hearing 10 meant sacrificing availability to those family 11 members, and that is a very troubling thing to me. 12 And so I want to inform the Court that we will 13 seek every sanction possibly available, if it is 14 determined this is bad faith, because this type of 15 expense and delay -- We have yet to receive one 16 single document from Mr. Shaw's clients, even 17 though discovery went out with the complaint. Miss 18 Reynolds has discovery due on Monday. 19 And so this seems to be just a grand scheme to 20 just throw anything up at the last minute to keep 21 us from advancing this ball. It is, it is very 22 important that if these Roanoke citizens are going 23 to get a trial before a jury of their peers, that 24 these cases do need to move expeditiously. That is</p>
<p style="text-align: right;">14</p> <p>1 But my point is that's long expired, and I 2 think there's some obtuse and very, very incorrect 3 argument going on here that the "invitation" by the 4 trustee to the judge in Boston somehow set a new 5 clock for Mr. Shaw and his client to file a notice 6 of removal in the Western District, when there is 7 no federal question here and there is no diversity. 8 So we would like to rather stridently place on 9 the record our objection to this. We believe it is 10 part of an ongoing scheme to delay this case. 11 We would remind Counsel that there is an 12 obligation that there be good faith basis and law 13 in fact for every pleading filed in the court. We 14 don't believe there is such a one. We believe that 15 is why we were not told about this. 16 My office has been consulting with Mr. Shaw's 17 office all week to try to get dates rescheduled for 18 Miss Reynolds' doctors. She has cooperated, and 19 John Jessee has provided us dates. The doctors 20 have provided us dates. We're trying to 21 accommodate their request to reschedule 22 depositions, and meanwhile we get absolute silence 23 out of Mr. Shaw's office. And then instead of 24 using e-mail like we have done with everything</p>	<p style="text-align: right;">16</p> <p>1 one of the requirements of the mandatory 2 abstention, is that they can be "timely 3 adjudicated" where they are in the state court. 4 I've assured the judge in Boston that that is 5 exactly what they will be, is timely adjudicated. 6 As you know, we have a trial date in this case next 7 April. I think a year from today we'll be in 8 trial. 9 So that's the situation. So games really 10 don't have that kind of a role in this case. And 11 there are personal issues in this case. I have a 12 14 year old who is sitting in Salem High School, 13 and if he wants to go to college in a few years, we 14 have to get these cases moving so that there will 15 be a resolution. These are real lives, and so when 16 games are played, that just has a price tag. 17 And that's the point that I would like to 18 make, and I'm here I understand to argue the other 19 ten motions for summary judgment, so I'll do that 20 at your pleasure. 21 THE COURT: Well, let me -- 22 MS. REYNOLDS: Your Honor, May I -- 23 THE COURT: Both of you sit down. Let me just 24 clarify a couple of things, and I'll hear from you,</p>

<p style="text-align: right;">17</p> <p>1 Miss Reynolds and Mr. Shaw.</p> <p>2 Let me -- I appreciate and I understand and I</p> <p>3 believe and I had cases and I have cases now; in</p> <p>4 fact, my very firm belief is that with rare</p> <p>5 exceptions, and there are those rare exceptions,</p> <p>6 but with rare exception every case I have, criminal</p> <p>7 or civil, has a direct impact on somebody.</p> <p>8 Otherwise, we wouldn't be here.</p> <p>9 The system that has been set up for centuries</p> <p>10 since the foundation of the Republic has been</p> <p>11 continually tweaked and modified, tested against</p> <p>12 the Constitution; when found wanting corrected,</p> <p>13 when not implemented. And the suggestion that any</p> <p>14 practicing lawyer in Virginia would intentionally</p> <p>15 abuse or misuse the system for improper purposes is</p> <p>16 something that I take very seriously.</p> <p>17 Having said that; and I've imposed sanctions.</p> <p>18 It is not the habit nor the tradition nor the</p> <p>19 custom in this part of the state usually to</p> <p>20 entertain sanctions. I have imposed sanctions on</p> <p>21 my own. The Supreme Court has made clear in the</p> <p>22 Benítez case that 801.271.1 is self implementing.</p> <p>23 If the Court finds a violation, it doesn't have to</p> <p>24 be on a motion. It's done sua sponte, and I've</p>	<p style="text-align: right;">19</p> <p>1 morning, and when family members are lost, that</p> <p>2 creates a lot of emotion. But there's a procedure</p> <p>3 and a system by which those cases are dealt with.</p> <p>4 There's a procedure and system in which these</p> <p>5 cases are dealt with, and we're going to stick to</p> <p>6 that. And if it becomes necessary at any stage to</p> <p>7 impose sanctions against anybody; a party, counsel,</p> <p>8 local counsel, out-of-town counsel, foreign</p> <p>9 counsel, unlicensed counsel or anybody else; I'm</p> <p>10 certainly going to do it.</p> <p>11 But I don't have anything to my knowledge at</p> <p>12 this time that would suggest that anybody in this</p> <p>13 courtroom who is practicing law has done anything</p> <p>14 inappropriate or otherwise. I'm not going to be</p> <p>15 involved in collateral discussion at this time</p> <p>16 about motivation or otherwise, which is why I asked</p> <p>17 Miss Reynolds and Mr. Shaw to sit down,</p> <p>18 anticipating that they might want to respond to</p> <p>19 some of that. I will hear responses on substance,</p> <p>20 but not on the ad hominem issues.</p> <p>21 And I have been in Mr. Sexton's not identical</p> <p>22 position but very close. When you have other</p> <p>23 things going on and nerves get drawn tight and</p> <p>24 wires get a little tight, sometimes you take</p>
<p style="text-align: right;">18</p> <p>1 done that. I've had that upheld on appeal.</p> <p>2 On the other hand, Judge Trebue, the former</p> <p>3 chief judge of this circuit, once said decades ago</p> <p>4 frankly I guess now, in a case in which we had a</p> <p>5 number of litigants, more litigants than you all</p> <p>6 have here, and some attorneys from outside the area</p> <p>7 brought in a motion for sanctions, and Judge Trebue</p> <p>8 reminded them that in his view that litigation was</p> <p>9 to be between the parties, not between the lawyers,</p> <p>10 and that if they wanted to change that, he needed</p> <p>11 to be ruling on it. And I'm still of the same</p> <p>12 belief.</p> <p>13 The fact that people adhere to rules, rules of</p> <p>14 court, statutes, case law, in the interest of their</p> <p>15 clients may cause disadvantage, pain or harm to the</p> <p>16 other side because of the human nature or the human</p> <p>17 circumstances of the other side is always</p> <p>18 regrettable, but it is nonetheless a necessary and</p> <p>19 concomitant part of the system.</p> <p>20 So while I realize, and I told you all last</p> <p>21 time, I know there's a lot of emotion in this case,</p> <p>22 and I can appreciate that. This is not the only</p> <p>23 case in which there's a lot of emotion. In fact, I</p> <p>24 just finished dealing with some murder cases this</p>	<p style="text-align: right;">20</p> <p>1 positions or express an appropriate position in</p> <p>2 ways that you might not express when things aren't</p> <p>3 so tight. I appreciate and understand that, and</p> <p>4 that's not a problem. My point is I want to stick</p> <p>5 to my knitting, and all I want to do is deal with</p> <p>6 what I have.</p> <p>7 So with that, Miss Reynolds, if you have</p> <p>8 something of substance, I absolutely will hear you,</p> <p>9 and then thereafter, Mr. Shaw, I'll hear you.</p> <p>10 MS. REYNOLDS: Your Honor, there's really only</p> <p>11 one little thing I wanted to comment on that Mr.</p> <p>12 Sexton brought up, and that is we're trying to move</p> <p>13 this case along, and we've got discovery going.</p> <p>14 We've got responses to our written discovery due</p> <p>15 from Insight on Monday. We've got depositions</p> <p>16 scheduled for the end of April and into May.</p> <p>17 We would like this case to proceed forward, so</p> <p>18 that we can get the documents we need to take the</p> <p>19 discovery depositions in April and May. And I</p> <p>20 guess we kind of need a sense of can we go forward,</p> <p>21 you know, with discovery. I don't think that</p> <p>22 there's anything that's been entered indicating</p> <p>23 that we shouldn't.</p> <p>24 THE COURT: I don't -- Are you asking me?</p>

<p style="text-align: right;">21</p> <p>1 MS. REYNOLDS: Yes, sir, because --</p> <p>2 THE COURT: What have I done to stop</p> <p>3 discovery?</p> <p>4 MS. REYNOLDS: I don't want to come back to</p> <p>5 the Court on a motion to compel because, because</p> <p>6 Mr. Shaw filed a removal notice with the Court,</p> <p>7 when the discovery is due next week and it hasn't</p> <p>8 been decided on.</p> <p>9 THE COURT: Miss Reynolds, frankly, I</p> <p>10 apologize. I don't understand your question. If</p> <p>11 you need to file a motion to appeal, file it. I'm</p> <p>12 not stopping anybody from filing anything.</p> <p>13 I was specifically talking about ad hominem</p> <p>14 comments being made and the allusion, alluding to</p> <p>15 sanctions. That's all I'm talking about.</p> <p>16 If discovery isn't done, you know, I'll tell</p> <p>17 everybody right now, as I told some lawyers the</p> <p>18 other day; in 11 years on the bench I probably</p> <p>19 haven't had four discovery disputes, maybe five.</p> <p>20 The rules I think are remarkably clear.</p> <p>21 They've been in existence for years. You all use</p> <p>22 them all the time. You're familiar with them,</p> <p>23 probably more familiar with them than I am. But</p> <p>24 I'm familiar enough with them that I don't have any</p>	<p style="text-align: right;">23</p> <p>1 to get some documents that NECC has that everybody</p> <p>2 would want. I would imagine the doctors would want</p> <p>3 the documents from NECC, the company that produced</p> <p>4 the adulterated steroids that injured their</p> <p>5 patients, Miss Wingate's husband and countless</p> <p>6 others.</p> <p>7 I don't understand it, frankly. It's baffling</p> <p>8 to me why everybody doesn't want to be -- except</p> <p>9 Plaintiff's Counsel perhaps -- why everybody</p> <p>10 doesn't want to be in the multidistrict litigation,</p> <p>11 because NECC has a lot of information that we would</p> <p>12 like to get hold of.</p> <p>13 But be that as it may, I'm just going to say</p> <p>14 the Court said what it did on ad hominem attacks,</p> <p>15 and I'm not going to respond to each and every one</p> <p>16 of those.</p> <p>17 THE COURT: All right. I'm going to deal with</p> <p>18 that issue first, then we'll get to the rest of</p> <p>19 this. And I can handle this in a number of</p> <p>20 different ways, but all of them will take time.</p> <p>21 And I don't want to -- I agree with everybody. I</p> <p>22 don't want to take time. I can get briefing, I can</p> <p>23 get a lot of things. It's just I don't really</p> <p>24 think I need to know too much about the law to deal</p>
<p style="text-align: right;">22</p> <p>1 real problem with it. And I don't have any real</p> <p>2 problem with discovery disputes, and I haven't.</p> <p>3 And I don't intend to have any problems with</p> <p>4 discovery disputes in this case.</p> <p>5 But if I'm wrong about all of that and there's</p> <p>6 a discovery issue that needs to be dealt with, set</p> <p>7 it for hearing. I'll deal with it.</p> <p>8 Now, Mr. Shaw, your turn.</p> <p>9 MR. SHAW: Your Honor, I'm here to respond to</p> <p>10 the motions for partial summary judgment. This</p> <p>11 case --</p> <p>12 THE COURT: No, we're still on the removal</p> <p>13 issue. Anything else on that?</p> <p>14 MR. SHAW: On the removal issue, I would stand</p> <p>15 by my client's position that this case has been</p> <p>16 removed to federal court. All the arguments that</p> <p>17 have been made today about the removal are moot.</p> <p>18 This case is no longer in the jurisdiction of this</p> <p>19 court, at this time.</p> <p>20 Perhaps it will be moved back on remand. I</p> <p>21 don't know. We're going to fight that, because we</p> <p>22 believe that we should be in the multidistrict</p> <p>23 litigation. For one thing, NECC is in the</p> <p>24 multidistrict litigation, and we'll have a chance</p>	<p style="text-align: right;">24</p> <p>1 with this, because this to me is frankly common</p> <p>2 sense.</p> <p>3 And I'm going to start with the observation,</p> <p>4 particularly for the clients who are present, that</p> <p>5 it's very clear that state trial courts, circuit</p> <p>6 courts in Virginia and federal trial courts,</p> <p>7 district courts, are of equal dignity at law.</p> <p>8 So we have different jurisdiction. There are</p> <p>9 some things I can do that a district court federal</p> <p>10 judge can't do, and some things the federal</p> <p>11 district court judge can do that I can't do. Other</p> <p>12 than that, the trial courts are in two parallel</p> <p>13 systems.</p> <p>14 I have been very recently briefed by an</p> <p>15 outstanding bankruptcy practitioner, who mistakenly</p> <p>16 thought that when he had a date in a bankruptcy</p> <p>17 court, that he could just tell me that he didn't</p> <p>18 need to be in state trial court. I asked him to</p> <p>19 explain why bankruptcy court was a court of higher</p> <p>20 dignity than the state trial court, and he very</p> <p>21 professionally and very nicely noted that in fact</p> <p>22 it was not, and there was no authority and he was</p> <p>23 wrong, and we worked all that out and everything</p> <p>24 was fine.</p>

<p style="text-align: right;">25</p> <p>1 So I'm not at all concerned or worried or 2 otherwise about where all of us rank in the 3 relative scheme of things, in terms of federal and 4 state courts. 5 All that having been said; obviously there are 6 statutes. Obviously you all are familiar with 7 them. I'm not, and like Miss Reynolds and Mr. 8 Sexton, I haven't seen and don't need to see 9 anything pertaining to removal. 10 I take that back. At my request, not engaged 11 in ex parte, I was actually forgetting that since 12 the time that I practiced that the federal courts 13 have gotten into electronic practice, and I was 14 primarily, for the reasons that I might find some 15 humor in it, to see which district judge locally 16 had entered the order. 17 I asked Mr. Shaw just to give me the order, 18 and he handed me a packet and then reminded me that 19 it was all done electronically, at which stage I 20 handed the packet back and looked at him. 21 So I have actually seen it, but I haven't seen 22 it in any beneficial or productive way and don't 23 need to, because the simple reality is this: I can 24 say yeah, you all are right and Mr. Shaw is wrong,</p>	<p style="text-align: right;">27</p> <p>1 incorrect. 2 So I'm just not going to deal with it. I'm 3 going to take it as today on the record and without 4 prejudice to anyone, because if after seeing it or 5 otherwise you all are advised that it hasn't been 6 removed, for example, or that Mr. Shaw is mistaken 7 -- and I'm not suggesting, Mr. Shaw, that would be 8 an intentional mistake, but I'm just trying to 9 flush out the intellectual hypothetical 10 possibilities -- then set it for hearing and we'll 11 expedite the hearing. That's not a problem. 12 Otherwise, I think it would needlessly muddy the 13 water and create consternation that doesn't need to 14 be created, when I'm advised by Counsel that, by 15 one counsel that the matter had been removed. 16 So I'm just going to cut that out. If you all 17 for the purposes of the order want to say it's 18 taken under advisement, that's fine too. It 19 doesn't really matter to me how you phrase it. I'm 20 just not going to deal with it today. If there's a 21 need to deal with it later, I'm happy to deal with 22 it. 23 If it gets remanded, obviously I'll deal with 24 it. If it doesn't get remanded, then there's some</p>
<p style="text-align: right;">26</p> <p>1 I'm going to go ahead and proceed, and then in all 2 likelihood -- engaging in just appropriate cynicism 3 -- the federal district court will say yeah, we've 4 got jurisdiction too. And we're going to have two 5 courts in essence either competing or directing 6 orders at each other or otherwise. 7 It would create I would think inordinate 8 problems for appellate review. It would look 9 horrible from the standpoint of public perception, 10 and would not in any way enhance the sense of 11 legitimacy that taxpayers and citizens who use the 12 court system ought to have. And the fact whether 13 they agree or disagree with what happens in court, 14 they ought to agree it's been handled fairly and in 15 a deliberative fashion. 16 And so I just don't think I can in any fair 17 way -- Mr. Gardner may be entirely correct and Mr. 18 Sexton and Miss Reynolds may be entirely correct, 19 but the Court that needs to say that they're 20 correct I think is the federal court for the 21 Western District of Virginia, and if they remand 22 it, they remand it. If they don't remand it, then 23 apparently until the Fourth Circuit rules on it Mr. 24 Gardner, Miss Reynolds and Mr. Sexton may be</p>	<p style="text-align: right;">28</p> <p>1 way we can continue to exercise state jurisdiction, 2 under whatever the terms of the removal are. That 3 too can be done. Otherwise, I think we're just 4 wasting time going over issues; when Mr. Shaw says 5 it's been removed. So I'm not going to deal with 6 that. 7 Now that leaves I know Mr. Sexton's motion for 8 partial summary judgment, which in essence is, if I 9 understand correctly, is that through request for 10 admissions that Mr. Shaw's client and perhaps 11 others admitted that they're not healthcare 12 providers under the statute, and as a result of 13 which Mr. Sexton urges that partial summary 14 judgment ought be granted to make clear that they 15 do not fall under the malpractice cap. Is that in 16 essence? 17 MR. SEXTON: That's it. I would only add that 18 just a motion for summary judgment, that they are 19 not healthcare providers as well, because it has 20 greater ramifications as we're picking witnesses, 21 for example. 22 THE COURT: I understand, but -- 23 MR. SEXTON: So they're not a healthcare 24 provider, and therefore are not subject to the cap.</p>

<p style="text-align: right;">29</p> <p>1 THE COURT: So where are you on that, Mr.</p> <p>2 Shaw?</p> <p>3 MR. SHAW: Your Honor, thank you.</p> <p>4 We were given requests for admissions in each</p> <p>5 one of the cases that were listed, the Bradley,</p> <p>6 Epperly, Filson, Foutz, et cetera cases. We</p> <p>7 responded to all of them the requests for</p> <p>8 admissions timely, admitting that we --</p> <p>9 THE COURT: That you're not a healthcare</p> <p>10 provider.</p> <p>11 MR. SHAW: -- that we're not a healthcare</p> <p>12 provider. So what I don't understand is why we're</p> <p>13 seeking an advisory opinion from the Court, when by</p> <p>14 operation of law we've already been found to be not</p> <p>15 a healthcare provider.</p> <p>16 THE COURT: Well, I don't think it's an</p> <p>17 advisory opinion. I think what they're asking for,</p> <p>18 obviously you can have partial summary judgment.</p> <p>19 Obviously, although it's not exactly analogous,</p> <p>20 it's more commonly done.</p> <p>21 I don't think, I can't recall I've ever had it</p> <p>22 come up in this particular context, but it more</p> <p>23 frequently comes up in the context of striking</p> <p>24 partial summary judgment to strike punitive claims,</p>	<p style="text-align: right;">31</p> <p>1 MR. SEXTON: We will, Your Honor. I think</p> <p>2 it's not surprising that sometimes parties do amend</p> <p>3 their answer to requests for admission.</p> <p>4 THE COURT: I understand that.</p> <p>5 MR. SEXTON: And it would be very unfair in</p> <p>6 this case to get all the way up to the 11th hour of</p> <p>7 trial and then get an amended answer, which would</p> <p>8 mean disqualifying --</p> <p>9 THE COURT: You're getting what you want.</p> <p>10 MR. SEXTON: I agree. Thank you, but I was</p> <p>11 just explaining why.</p> <p>12 THE COURT: I --</p> <p>13 MR. SEXTON: Thank you, Judge. We'll submit</p> <p>14 the order.</p> <p>15 THE COURT: You don't need to persuade me.</p> <p>16 I'm trying to get you where you want.</p> <p>17 MR. SEXTON: Since they are simple, can we</p> <p>18 dispense with endorsement and just submit a copy?</p> <p>19 THE COURT: No. I get very concerned about</p> <p>20 the integrity of the record. You all are certainly</p> <p>21 free, and your firm frankly does it probably more</p> <p>22 often than others, which is fine, to get Counsel to</p> <p>23 waive or to permit endorsement by you all.</p> <p>24 I frankly have talked to some of -- When you</p>
<p style="text-align: right;">30</p> <p>1 if willfulness and wanton or intentional disregard</p> <p>2 or otherwise hasn't been made out or been admitted</p> <p>3 not to be present under the pleading and we do</p> <p>4 that, then I don't see how this is markedly</p> <p>5 different from that.</p> <p>6 MR. SHAW: Well, Your Honor, actually what</p> <p>7 they're asking essentially is are we or are we not</p> <p>8 a healthcare provider. We're saying we're not.</p> <p>9 We're not subject to the cap. We can't use that as</p> <p>10 an affirmative defense or a defense to damages.</p> <p>11 It's entered by operation of law. I don't see</p> <p>12 that there's any reason for any more than that.</p> <p>13 This is --</p> <p>14 THE COURT: I don't think he's asking for any</p> <p>15 more than that.</p> <p>16 MR. SHAW: Well, it's already been done.</p> <p>17 We've admitted that by operation of law.</p> <p>18 THE COURT: So we have an order that you've</p> <p>19 admitted it by operation of law, and that they're</p> <p>20 not under the cap.</p> <p>21 MR. SHAW: And the request for admissions is</p> <p>22 admitted.</p> <p>23 THE COURT: All right. Well, put it in the</p> <p>24 order as admitted.</p>	<p style="text-align: right;">32</p> <p>1 get the number of lawyers that we have here and/or</p> <p>2 more, I think all of us start getting a little, a</p> <p>3 little concerned, you know, when I start getting 13</p> <p>4 or 14 lawyers, that one person endorses for all of</p> <p>5 them.</p> <p>6 Now, I've not yet had a problem with that,</p> <p>7 however. So all I'm going to say is I get</p> <p>8 sensitive about that. But no, I don't like that.</p> <p>9 And I will accept, though, Mr. Sexton, particularly</p> <p>10 in today's world in this kind of case and with</p> <p>11 where the offices are and that sort of thing, I</p> <p>12 will accept fax'ed endorsements, if that will</p> <p>13 simplify matters, so it doesn't take two months to</p> <p>14 send something around by mail. I agree with you; I</p> <p>15 want to get the orders in and get them entered.</p> <p>16 Any way you all want to do it is fine. Yeah,</p> <p>17 I'm not going to compel people to give up rights to</p> <p>18 endorsement. I don't like that personally.</p> <p>19 So that takes care of that. And Miss</p> <p>20 Reynolds, you've got demurrers?</p> <p>21 MS. REYNOLDS: Yes, sir.</p> <p>22 THE COURT: All right.</p> <p>23 MS. REYNOLDS: Mr. Gardner and I have</p> <p>24 demurrers on behalf of Dr. Mathis, Dr. O'Brien,</p>

<p style="text-align: right;">33</p> <p>1 Image Guided Pain Management, which we'll refer to</p> <p>2 as IGPM collectively.</p> <p>3 The demurrers, first stating the standard for</p> <p>4 demurrer, admits the truth of all properly pled</p> <p>5 material facts in the complaint, and all reasonable</p> <p>6 factual inferences fairly and justly drawn from the</p> <p>7 facts alleged.</p> <p>8 THE COURT: Yeah, and I understand that. I</p> <p>9 know where the demurrers are, and I understand what</p> <p>10 a demurrer is.</p> <p>11 MS. REYNOLDS: We are demurring to Count 2,</p> <p>12 Consumer Protection Act, Count 4, gross negligence,</p> <p>13 Count 5, fraud, and to the punitive damages claim.</p> <p>14 Your Honor, I don't see that it's necessary to</p> <p>15 go through the specific facts, unless the Court</p> <p>16 wants to hear. I think you heard sufficiently the</p> <p>17 last time we were here.</p> <p>18 Suffice it to say that Mr. Wingate went to the</p> <p>19 Insight Imaging Roanoke location on September 6 of</p> <p>20 2012 for an epidural steroid injection in his C</p> <p>21 spine for shoulder pain. Dr. O'Brien administered</p> <p>22 that injection. Subsequent to that, he was found</p> <p>23 to have meningitis and passed.</p> <p>24 The steroid used was methylprednisolone</p>	<p style="text-align: right;">35</p> <p>1 is authorized under the laws and regulations of</p> <p>2 this Commonwealth or the United States."</p> <p>3 In other words, if the aspect complained of is</p> <p>4 authorized under another section of Virginia or</p> <p>5 federal law, then the VCPA does not apply, and the</p> <p>6 claim cannot be brought for it under the VPCA.</p> <p>7 The Virginia Supreme Court examined this</p> <p>8 provision in Manassas Auto Parts, Inc. v. Couch,</p> <p>9 274 Va. 82. They held that, "Authorized actions,"</p> <p>10 meaning actions which are excluded, are those that</p> <p>11 are "sanctioned by statute or regulation." In</p> <p>12 other words, actions that are sanctioned by</p> <p>13 Virginia or federal law cannot be complained of</p> <p>14 under the Virginia Consumer Protection Act.</p> <p>15 Conversely, actions that are merely regulated</p> <p>16 by Virginia or federal law can be actionable under</p> <p>17 the Virginia Consumer Protection Act. Here the</p> <p>18 formulation, compounding, sale, prescription,</p> <p>19 dispensing and administration of prescription drugs</p> <p>20 are sanctioned under Virginia and federal law, and</p> <p>21 therefore are expressly excluded from the Virginia</p> <p>22 Consumer Protection Act.</p> <p>23 Section 54.1-3408(A) of Virginia's Drug</p> <p>24 Control Act states that, "A practitioner of</p>
<p style="text-align: right;">34</p> <p>1 acetate, compounded and supplied by NECC, purchased</p> <p>2 by Insight Health for the Roanoke location. And I</p> <p>3 turn it over to Mr. Gardner, who will argue the</p> <p>4 Consumer Protection Act and gross negligence count.</p> <p>5 THE COURT: I don't usually split up</p> <p>6 arguments, like I don't usually split up</p> <p>7 cross-examination; but sure, go ahead, Mr. Gardner.</p> <p>8 MS. REYNOLDS: Well, Your Honor, he's --</p> <p>9 THE COURT: Go ahead, Mr. Gardner.</p> <p>10 MR. GARDNER: Thank you, Your Honor. There</p> <p>11 are two aspects to IGPM's demurrer to the Virginia</p> <p>12 Consumer Protection Act claim.</p> <p>13 The first is that the claim of violation of</p> <p>14 VCPA, which I will abbreviate the Virginia Consumer</p> <p>15 Protection Act as, for misrepresenting the drug's</p> <p>16 quality during IGPM's treatment of the Decedent is</p> <p>17 expressly excluded under the language of the</p> <p>18 statute; and the second aspect is that damages for</p> <p>19 wrongful death and personal injury are not</p> <p>20 available under the VCPA.</p> <p>21 First, the claim is expressly excluded under</p> <p>22 Section 59.1-199(A) of the act of the VCPA. That</p> <p>23 section states that the VCPA shall not apply to,</p> <p>24 "any aspect of a consumer transaction, which aspect</p>	<p style="text-align: right;">36</p> <p>1 medicine shall only prescribe, dispense or</p> <p>2 administer controlled substances in good faith, for</p> <p>3 medicinal or therapeutic purposes, within the</p> <p>4 course of his professional practice."</p> <p>5 There are Virginia Code sections that prohibit</p> <p>6 the compounding of drugs, unless certain criteria</p> <p>7 are met. Similarly, the federal Food, Drug and</p> <p>8 Cosmetic Act prohibits the introduction or delivery</p> <p>9 for introduction in interstate commerce of any</p> <p>10 food, drug, device, tobacco product or cosmetic</p> <p>11 that is adulterated or misbranded -- the exact</p> <p>12 allegations in this case.</p> <p>13 These provisions, these federal and Virginia</p> <p>14 provisions are not mere regulations by which an</p> <p>15 already permissible action are undertaken. In --</p> <p>16 MR. SEXTON: I'm sorry, Mr. Gardner, I may be</p> <p>17 the only one in the courtroom that's confused, but</p> <p>18 I thought Your Honor ruled that you accepted the</p> <p>19 removal by Mr. Shaw of the Wingate matter, and the</p> <p>20 demurrers are only set in the Wingate matter. And</p> <p>21 then I thought you explained to us --</p> <p>22 THE COURT: I still have to hear them. If</p> <p>23 they're here, I'll hear them on whatever.</p> <p>24 MR. SEXTON: Okay. I heard you to say that</p>

<p style="text-align: right;">37</p> <p>1 you would then not want to be in conflict with the 2 federal court and so forth.</p> <p>3 THE COURT: You heard me entirely correctly.</p> <p>4 MR. SEXTON: Okay. I just misunderstood the 5 import of that.</p> <p>6 THE COURT: No no no. And what one of my 7 questions was and what I wasn't clear on is, is 8 this only on the Wingate matter?</p> <p>9 MR. GARDNER: This is noticed for Wingate, but 10 as with the motions for partial summary judgment, 11 they will be basically identical through all of 12 these cases.</p> <p>13 MR. SEXTON: It is only noticed on Wingate, 14 but again, there's a trickle.</p> <p>15 THE COURT: Well, I mean --</p> <p>16 MR. SEXTON: We don't have any objection. I 17 just wanted to make sure that I understood that you 18 want to go ahead and hear the argument.</p> <p>19 Right. It is, it is only briefed as to 20 Wingate. There are some instances where the facts 21 may be different; for example, Mr. Wingate is dead, 22 and we don't know exactly when he got these 23 brochures. Some of the clients are not dead. Some 24 of the clients got three shots, and so they would</p>	<p style="text-align: right;">39</p> <p>1 MR. SEXTON: That's excellent.</p> <p>2 THE COURT: And then as I'm going through 3 this, and because of the number of files, I don't 4 think I'm going to be able to rule from the bench 5 on the demurrers, but I want to hear everybody. 6 Then I'm going to have Miss Reynolds or both of you 7 or however you want to allocate costs order the 8 portion of the transcript that deals with their 9 argument on demurrers and your responses to 10 demurrers.</p> <p>11 Then I'm going to review the written 12 submissions, and if either of you wish to -- this 13 is not either a mandate, a dictate, nor even a 14 request for additional written authority -- but if 15 there is any that you wish to submit following 16 today's hearing, if it's done timely I'll be happy 17 to receive that as well.</p> <p>18 So thank you, Mr. Sexton. I think that clears 19 up the only little matter confusing perhaps that I 20 have, but I'm assuming that's where we were going. 21 Go right ahead.</p> <p>22 MR. GARDNER: Thank you, Your Honor. Just a 23 five second summary of where we are.</p> <p>24 THE COURT: Take as long as you want.</p>
<p style="text-align: right;">38</p> <p>1 have received them on multiple occasions. So that 2 will apply to one aspect, but --</p> <p>3 THE COURT: But you don't --</p> <p>4 MR. SEXTON: We could educate you as to --</p> <p>5 THE COURT: But you don't have any objection 6 to, you know, on lack of formal notice. Yeah, I 7 don't intend to deal with demurrer on Wingate, but 8 my understanding is like your partial summary 9 judgment, that this was common to all cases.</p> <p>10 MR. SEXTON: In essence --</p> <p>11 THE COURT: Mutatis mutandis, as we say.</p> <p>12 MR. GARDNER: And I'd be willing to stipulate 13 that these motions don't turn on some of the minute 14 factual differences between the cases. To the 15 extent that they do, please let me know if I 16 mention something that is unique and it turns on 17 it, please do.</p> <p>18 THE COURT: I'm sure they will. I'll let you 19 know.</p> <p>20 MR. SEXTON: Your Honor, I have no objection 21 to any of that, if it does avoid a waste of time 22 today, and it allows us to --</p> <p>23 THE COURT: That was my point. I just thought 24 we'd go ahead and put on everything we can put on.</p>	<p style="text-align: right;">40</p> <p>1 MR. GARDNER: The legislature states that 2 actions that are authorized under laws or 3 regulations of the Commonwealth of the United 4 States are excluded from the Virginia Consumer 5 Protection Act. The Virginia Supreme Court has 6 interpreted the word "authorized" to mean 7 sanctioned. There are federal and Virginia laws 8 that sanction the claims at issue in this case. 9 Therefore, we claim that they are excluded under 10 the VCPA.</p> <p>11 One of the issues is whether the laws federal 12 and Virginia that are on point are instead of 13 sanctioning the action are merely regulating the 14 action, and the Virginia Supreme Court has said 15 that if it's mere regulations, the claims are not 16 excluded from the VCPA.</p> <p>17 The one case that the Virginia Supreme Court 18 has heard that deals with this issue is Manassas 19 Auto Cars v. Couch, 274 Va. 82. In that case the 20 plaintiff alleged that an automobile dealer 21 violated Virginia's automobile advertising 22 standards code, provision 46.2-1581, and such 23 violation constituted a fraudulent act under the 24 practice -- or a fraudulent act or practice under</p>

<p style="text-align: right;">41</p> <p>1 the VCPA.</p> <p>2 The Court examined that and said no. This</p> <p>3 claim can go forward under the VCPA, because it is</p> <p>4 a mere regulation, and it's not a sanctioning of an</p> <p>5 action.</p> <p>6 And the distinction that the Court drew there</p> <p>7 is critical for this case. In Manassas Auto Cars,</p> <p>8 the plaintiff said you can't advertise cars this</p> <p>9 way. And the Court said that the law that says you</p> <p>10 can't advertise cars this way was a mere</p> <p>11 regulation.</p> <p>12 Here the allegations are you can't sell drugs</p> <p>13 this way, and that therefore you're violating the</p> <p>14 VCPA. The difference is this: The law does not</p> <p>15 permit or deny me or anyone else the right to</p> <p>16 advertise a vehicle, but the law does deny or</p> <p>17 permit people the right to compound and sell and</p> <p>18 prescribe and administer drugs.</p> <p>19 I can go place an ad in the Roanoke Times for</p> <p>20 my car and not run afoul of any laws. I don't need</p> <p>21 a statute to authorize me to go place an ad in the</p> <p>22 Roanoke Times to sell my car. But if I started</p> <p>23 compounding and selling drugs in my basement, I'll</p> <p>24 be running afoul of some pretty serious laws and</p>	<p style="text-align: right;">43</p> <p>1 They're saying the consumer transaction at issue is</p> <p>2 drug misbranding, not drug prescription or drug</p> <p>3 selling.</p> <p>4 The problem with that is if you define the</p> <p>5 Consumer Protection -- if you define the</p> <p>6 transaction at issue as the wrong act, the</p> <p>7 wrongdoing that is alleged in the complaint, well</p> <p>8 then of course no federal or state law is ever</p> <p>9 going to authorize that. No federal or state law</p> <p>10 is going to authorize the allegations of</p> <p>11 malfeasance that's in the complaint.</p> <p>12 So if you categorize the consumer transaction</p> <p>13 as the wrongful conduct alleged, then what is</p> <p>14 alleged would never ever be excluded from the</p> <p>15 Virginia Consumer Protection Act. Clearly the</p> <p>16 Legislature intended for certain claims to be</p> <p>17 excluded, and an interpretation which excludes none</p> <p>18 must be wrong.</p> <p>19 And so the consumer transaction at issue as to</p> <p>20 IGPM is the prescription and administration of</p> <p>21 drugs that is sanctioned under Virginia and federal</p> <p>22 law. It is excluded from the Virginia Consumer</p> <p>23 Protection Act. Those claims cannot proceed, and</p> <p>24 therefore we respectfully request that you grant</p>
<p style="text-align: right;">42</p> <p>1 regulations. Laws. I should not say regulations.</p> <p>2 Excuse me.</p> <p>3 That is the difference. That's why this is</p> <p>4 not mere regulation. Virginia law sanctions the</p> <p>5 prescription and administration of drugs. It does</p> <p>6 not sanction the advertisement of automobiles, and</p> <p>7 that's where Manassas Auto Cars shows that this</p> <p>8 case is different and that these claims are</p> <p>9 sanctioned under Virginia law, and that therefore</p> <p>10 they are expressly excluded from the Virginia</p> <p>11 Consumer Protection Act.</p> <p>12 Now in the Plaintiff's response, she claims</p> <p>13 that the transaction at issue is not selling or</p> <p>14 prescribing drugs. She claims that the transaction</p> <p>15 at issue is misrepresentation of the drug to the</p> <p>16 Decedent. And then Plaintiff contends that the</p> <p>17 Virginia Code or federal law would never authorize</p> <p>18 a party to misrepresent or misbrand a drug, and</p> <p>19 therefore it's not sanctioned under the Virginia</p> <p>20 Code, and therefore it can be claimed under the</p> <p>21 Virginia Consumer Protection Act.</p> <p>22 The Plaintiff's mistake here is to classify</p> <p>23 the consumer transaction at issue as the</p> <p>24 malfeasance that's alleged in the complaint.</p>	<p style="text-align: right;">44</p> <p>1 our demurrer on that aspect.</p> <p>2 The second aspect of our demurrer to the</p> <p>3 Virginia Consumer Protection Act is that personal</p> <p>4 injury and wrongful death damages are not available</p> <p>5 under that act. We understand that that is not the</p> <p>6 entirety of the expenses that Plaintiff has</p> <p>7 claimed, but we seek a demurrer to the effect that</p> <p>8 any personal injury or wrongful death damages that</p> <p>9 are sought under the Virginia Consumer Protection</p> <p>10 Act aren't unavailable.</p> <p>11 The Virginia Consumer Protection Act states</p> <p>12 that, "Only actual damages for any person who</p> <p>13 suffers loss as a result of violation of this</p> <p>14 chapter are available."</p> <p>15 Now, there's a split in Virginia law on this.</p> <p>16 Some Virginia circuit courts rightly hold that,</p> <p>17 "The General Assembly intended to permit recovery</p> <p>18 for pecuniary losses only, not damages for bodily</p> <p>19 injuries." That's a quote from a case called</p> <p>20 <i>Devonshire v. Euraupair International, Inc.</i>, 40 Va.</p> <p>21 <i>Cir. 149, Fairfax County 1996.</i></p> <p>22 Likewise, another case, <i>Deane v. Novacare</i></p> <p>23 <i>Orthotics</i>, states that, "Even considering the</p> <p>24 remedial nature of the statute and the fact that it</p>

<p style="text-align: right;">45</p> <p>1 should be broadly construed, this Court feels that</p> <p>2 a fair reading of the VCPA indicates that the</p> <p>3 actual damages language allowed by it are limited</p> <p>4 only to the pecuniary out-of-pocket losses that the</p> <p>5 Plaintiff has sustained."</p> <p>6 The Court elaborated that, "Damages can be and</p> <p>7 should be" -- excuse me. The Court stated that it</p> <p>8 would not allow the VCPA to be turned into a torts</p> <p>9 claim for products liability.</p> <p>10 Likewise, in this case they're asking for an</p> <p>11 expansive reading of the Virginia Consumer</p> <p>12 Protection Act to apply in a sense that would</p> <p>13 override Virginia's wrongful death statute.</p> <p>14 Essentially they're seeking a rule that the</p> <p>15 Virginia Consumer Protection Act trumps Virginia's</p> <p>16 Wrongful Death Act, which has an entire scheme</p> <p>17 established for apportioning damages and setting</p> <p>18 beneficiaries. It's an entire scheme within</p> <p>19 itself, and if the Virginia Consumer Protection Act</p> <p>20 were to intrude upon that, it would gum up the</p> <p>21 works. And the Court should not issue a ruling</p> <p>22 that conflates the two acts and subverts the will</p> <p>23 of the Legislature.</p> <p>24 And in their response, Plaintiff indicated</p>	<p style="text-align: right;">47</p> <p>1 number of issues, and I'll try to keep them</p> <p>2 organized. They'll bleed together, and I'll try to</p> <p>3 proceed expeditiously.</p> <p>4 In Count 4 of her complaint the Plaintiff</p> <p>5 asserts that Image Guided Pain Management was</p> <p>6 grossly negligent in its treatment of her, and in</p> <p>7 reference they simply state, "based on the</p> <p>8 foregoing acts and omissions in the complaint."</p> <p>9 The foregoing allegations are quite lengthy,</p> <p>10 but they fail to set forth a viable ground for</p> <p>11 gross negligence against IGPM. Most of those</p> <p>12 allegations are directed against Insight Health</p> <p>13 Corporation.</p> <p>14 Early in the complaint these ground rules are</p> <p>15 set. "At all times and places pertinent to this</p> <p>16 action, Insight Health" -- not IGPM -- "made the</p> <p>17 actual decisions and arrangements relating to the</p> <p>18 selection, procurement and preparation of drugs</p> <p>19 administered at Insight Imaging Roanoke, including</p> <p>20 the epidural steroid drug which is at issue in this</p> <p>21 case." Also, "Insight Health procured, received</p> <p>22 and provided to Mr. Harris the epidural" -- sorry</p> <p>23 -- "Mr. Wingate the epidural steroid injection</p> <p>24 which is at issue in this case.</p>
<p style="text-align: right;">46</p> <p>1 that a case called Humphrey v. Leewood Healthcare</p> <p>2 Center, which is a circuit court case, overturned</p> <p>3 the precedent which we cited. And that's actually</p> <p>4 incorrect.</p> <p>5 Humphrey v. Leewood Healthcare Center simply</p> <p>6 illustrates the fact that Virginia courts are split</p> <p>7 on this issue. Humphrey is issued from the same</p> <p>8 court that issued one of the cases that we cited in</p> <p>9 support. And so the Fairfax County court is split</p> <p>10 on this. It doesn't mean that the previous Fairfax</p> <p>11 County ruling issued by another judge has been</p> <p>12 overruled.</p> <p>13 In fact, in the case to which Plaintiff cites,</p> <p>14 they reference these cases that Plaintiff says are</p> <p>15 bad law as good law. There's good law. There's a</p> <p>16 split in Virginia courts. We believe that better</p> <p>17 recent opinion keeps the Virginia Consumer</p> <p>18 Protection Act within its appropriate confines.</p> <p>19 For those reasons we would respectfully</p> <p>20 request that the Court sustain our demurrer to the</p> <p>21 damages available under the Virginia Consumer</p> <p>22 Protection Act.</p> <p>23 The second aspect of our demurrer is</p> <p>24 Plaintiff's gross negligence claim. There are a</p>	<p style="text-align: right;">48</p> <p>1 "IGPM would allege that this purchasing</p> <p>2 decision was made without their advice, consent or</p> <p>3 knowledge. IGPM would allege that at times and</p> <p>4 places pertinent to this action they never knew</p> <p>5 that Insight Imaging Roanoke and its employees and</p> <p>6 agents were purchasing the methylprednisolone</p> <p>7 acetate from NECC.</p> <p>8 "Thus, under the express factual allegations</p> <p>9 in the complaint, IGPM was not responsible for the</p> <p>10 selection, procurement, receipt, preparation of the</p> <p>11 drug at issue, and is not vicariously responsible</p> <p>12 for the actions of Insight."</p> <p>13 In response, Plaintiff contends that she has</p> <p>14 sufficiently pleaded her cause of action, because</p> <p>15 she threw all the Defendants into the same pot and</p> <p>16 referenced us collectively as Insight Imaging</p> <p>17 Roanoke -- but this abrogates her responsibility to</p> <p>18 identify in basic terms who did what.</p> <p>19 The Defendants have a right to know, the right</p> <p>20 to be put on notice what claims are being brought</p> <p>21 against them. When you set ground rules and say</p> <p>22 this Defendant didn't engage in this practice, and</p> <p>23 then over the course of an extraordinarily long</p> <p>24 complaint take numerous contradictory stances that</p>

<p style="text-align: right;">49</p> <p>1 you can retreat to whenever a demurrer is made, 2 then the complaint becomes an object against which 3 no arguments can be made. 4 The Virginia Code does sanction pleading in 5 the alternative, but it shouldn't be used as a 6 vehicle for the complaint to turn into this 7 chameleon-like object against which nothing can 8 stick, against which no arguments can stick, 9 because you can say well, in this section I pleaded 10 in the alternative that you did do this, and in 11 this section I pleaded in the alternative that you 12 didn't do this. It doesn't give us the notice that 13 we're entitled to, and it abuses the right to plead 14 in the alternative. 15 So under the facts set forth in the complaint 16 as we read and as they are put on notice to the 17 Defendant, there is no gross negligence claim to be 18 made against Image Guided Pain Management, because 19 it falls well short of the standard that the 20 Virginia Supreme Court has set. 21 That standard states that gross negligence is, 22 "The utter disregard of prudence, amounting to 23 complete neglect of the safety of another, needless 24 and palpable violation of legal duty respecting</p>	<p style="text-align: right;">51</p> <p>1 would be to place an incredibly onerous burden on 2 them, or to employ the services of an independent 3 party who does that action. 4 In fact that's what actually exists. The 5 Virginia Legislature has stated that the obligation 6 for final checks for accuracy and for appropriate 7 conditions, appearance, and procedures for the 8 final product in pharmacies and drug compounding, 9 that responsibility lies with the pharmacists. 10 That is Section 54.1-3410.2(D) of the Virginia 11 Code. The Legislature consciously made a decision 12 not to impose this incredibly onerous burden on 13 healthcare practitioners. They would not have used 14 the words "final check" if that wasn't their 15 intent. 16 This court should not impose a common law 17 burden where the Virginia Legislature has expressly 18 chosen not to do the same thing. And no court in 19 the country has ever imposed this kind of burden on 20 healthcare practitioners. It may well be an 21 appropriate standard for an entity like Insight 22 Health to know where it's purchasing drugs from, 23 but for doctors who don't engage in the purchase of 24 drugs, this would grind their practice to a</p>
<p style="text-align: right;">50</p> <p>1 the rights of others, which amounts to the absence 2 of slight diligence, or the want of even scant 3 care." 4 Plaintiff's allegation that Image Guided Pain 5 Management should have in some specified way tested 6 the steroid at issue for contamination before using 7 it or inspect the facilities that another entity 8 was ordering this drug from would impose an 9 incredible burden on the healthcare system. 10 They're asking that doctors be held 11 responsible for the purchasing decision made by 12 another entity, that doctors have a standard of 13 care placed upon them that they inspect drugs that 14 come into their facility, that they have a 15 fully-functioning inspection lab in their facility 16 and are somehow able to complete this task in their 17 office -- which as an aside would require them to 18 open sealed vials and contaminate things even 19 further -- or that they go out and tour the country 20 from wherever they're ordering drugs from. 21 The Plaintiff says well, they could have just 22 ordered them from Pfizer. But Pfizer is subject to 23 lawsuits. Pfizer is subject to recalls. The only 24 way to be sure that what they're getting is clean</p>	<p style="text-align: right;">52</p> <p>1 complete halt. 2 For those reasons, we respectfully request 3 that the Court sustain our demurrer on the gross 4 negligence count in Plaintiff's complaint. Thank 5 you, Your Honor. 6 THE COURT: Thank you. 7 MS. REYNOLDS: Your Honor, all of the 8 demurrers, the claims -- 9 THE COURT: What are you addressing now? 10 MS. REYNOLDS: I'm addressing fraud and 11 punitive damages. But with regard to all the 12 demurrers, Your Honor, the claims made in the 13 complaint are the same. So it should, these 14 arguments apply equally to the other lawsuits that 15 have been filed. 16 THE COURT: Has Mr. Gardner finished what he's 17 doing? 18 MS. REYNOLDS: Yes, sir. 19 MR. GARDNER: Yes, Your Honor. 20 THE COURT: So you're not going to be coming 21 back? So I'm not going to hear from Miss Reynolds 22 and then hear from you? 23 MR. GARDNER: I apologize. I'm done. 24 THE COURT: No no, there's nothing to</p>

<p style="text-align: right;">53</p> <p>1 apologize for. Go ahead.</p> <p>2 MS. REYNOLDS: Your Honor, I'm arguing the</p> <p>3 demurrers on the fraud count and the punitive</p> <p>4 damages.</p> <p>5 Your Honor knows that a fraud, in order to</p> <p>6 claim fraud the elements are false representation</p> <p>7 of a material fact, made intentionally or knowingly</p> <p>8 with intent to mislead the Plaintiff. The</p> <p>9 Plaintiff relied on the misrepresentation, which</p> <p>10 led to the injury or damages.</p> <p>11 Your Honor, in this case, and I cited to the</p> <p>12 Court actually that fraud must be pled or must be</p> <p>13 distinctly stated. Generalized, nonspecific</p> <p>14 allegations are insufficient. It cannot be vague</p> <p>15 or indefinite or conclusory.</p> <p>16 The Virginia Supreme Court has ruled and</p> <p>17 actually sustained a demurrer on a fraud count in</p> <p>18 Tuscarora, Inc. v. B.V.A. Credit Corporation, 218</p> <p>19 Va. 849, where the Court held that the complaint</p> <p>20 didn't have allegations specific enough, because it</p> <p>21 didn't say the who, what, when and where of the</p> <p>22 fraud that was complained.</p> <p>23 The complaints in this case and the complaint</p> <p>24 in all of the other meningitis cases before the</p>	<p style="text-align: right;">55</p> <p>1 the end they all say the patient tolerated the</p> <p>2 procedure well and left the department in a stable</p> <p>3 condition, which implies that this note was</p> <p>4 prepared after the patient had come and gone.</p> <p>5 So the patient can't rely on that procedure</p> <p>6 note, after the patient has come and gone. So that</p> <p>7 aspect of a fraud claim, the patient relied on the</p> <p>8 misrepresentation, does not exist with regard to</p> <p>9 the claim in the fraud count that the doctor's</p> <p>10 procedure notes identified Depo-Medrol.</p> <p>11 What is not in the complaint is anything</p> <p>12 indicating that Dr. Mathis or Dr. O'Brien spoke</p> <p>13 with the Plaintiffs and told them what Depo Medrol</p> <p>14 is and how that is different from other types of</p> <p>15 steroids, whether or not it had -- the integrity of</p> <p>16 the medication, nothing in the complaints indicate</p> <p>17 that any literature provided to the Plaintiffs was</p> <p>18 provided to them from the doctors. For all we know</p> <p>19 in the complaints, they picked it up in the lobby.</p> <p>20 Nothing indicating -- Well, the complaints</p> <p>21 also indicate that actions such as sending the</p> <p>22 procedure note to the primary care physician, such</p> <p>23 as billing for Teva Parenteral Medicines, billing</p> <p>24 the wrong medication to the insurance company; all</p>
<p style="text-align: right;">54</p> <p>1 Court, the Plaintiffs have claimed that the doctors</p> <p>2 did not know -- Actually I'll identify exactly.</p> <p>3 "On information and belief, the doctors would</p> <p>4 allege that the purchasing decisions were made</p> <p>5 without their advice, consent or knowledge; that</p> <p>6 they never knew that Insight Imaging Roanoke and</p> <p>7 its employees and agents were purchasing from NECC;</p> <p>8 never knew that the steroid drug they were</p> <p>9 injecting came from NECC, came from NECC with the</p> <p>10 kinds of conditions that existed at that time."</p> <p>11 And so Plaintiff has set forth the fact that</p> <p>12 the doctors did not know about this. So those are</p> <p>13 the facts we're operating under in these demurrers,</p> <p>14 and yet the Plaintiff then comes along and says</p> <p>15 well, because Dr. O'Brien had in his procedure</p> <p>16 note, or the other doctor, Dr. Mathis, when he</p> <p>17 injected for the other plaintiffs, had in their</p> <p>18 procedure notes Depo-Medrol, and when the doctors</p> <p>19 identified Depo-Medrol in their procedure notes,</p> <p>20 the Court will look at the procedure notes that</p> <p>21 were attached to each and every one of the</p> <p>22 complaints.</p> <p>23 You will note that all of the language in it</p> <p>24 is in past tense; that it was administered, and at</p>	<p style="text-align: right;">56</p> <p>1 of the billing allegations, all of the sending</p> <p>2 procedure notes out to other, other medical</p> <p>3 providers, all of that stuff occurred after the</p> <p>4 patient would have had the opportunity to rely.</p> <p>5 Billing occurs after the procedure. Procedure</p> <p>6 note preparation and sending off to a primary care</p> <p>7 physician occurs after the procedure is performed.</p> <p>8 So there isn't necessarily, the necessary reliance.</p> <p>9 Plaintiff claims that oh, yes, but there's</p> <p>10 such a thing called a fraud via intermediary claim</p> <p>11 that can be asserted here. That is not so, Your</p> <p>12 Honor. Fraud via intermediary does not work here.</p> <p>13 First off, the Virginia courts have not</p> <p>14 recognized a fraud via intermediary claim; but</p> <p>15 secondly, in order for that claim to succeed, you</p> <p>16 have to articulate a misstatement of material fact</p> <p>17 to an intermediary, with the anticipation that the</p> <p>18 intermediary will then tell the intended target,</p> <p>19 and that person will rely and be injured.</p> <p>20 That's not the case here, because the intended</p> <p>21 third party to be injured has already had their</p> <p>22 injection. The procedure note, the billing</p> <p>23 records, all of that occurred after the patient</p> <p>24 would have had the opportunity to rely.</p>

<p style="text-align: right;">57</p> <p>1 So there is no fraud via intermediary claim 2 here in any of these cases. And for those reasons, 3 as far as the fraud claim is concerned, Your Honor, 4 we argue that there was no reliance, there's no 5 indication that the patients relied on anything 6 from the doctors. 7 And then, Your Honor, with regard to the 8 punitive damages claim; we would argue that for 9 punitive damages it is required that there be 10 actual malice, recklessness, negligence that is a 11 conscious disregard of the rights of others. And 12 in order to have a conscious disregard for the 13 rights of others, the Defendant must be aware that 14 the conduct would cause injury to another. 15 And for this particular case Plaintiff has 16 stated in their brief that for punitive damages 17 they are asserting that as to the gross negligence 18 and the fraud claim. 19 Well, first off, we don't believe there are 20 valid gross negligence or fraud claims, so there's 21 no punitive damages; but also with regard to the 22 conscious disregard, there's no conscious disregard 23 here, Your Honor. And the reason why we would 24 state that is because if you look at these</p>	<p style="text-align: right;">59</p> <p>1 no longer used. So we would argue to the Court 2 that since there were no cases prior to September 3 2012, since there were all of these doses 4 administered by the doctors and when they became 5 aware after -- we don't know how far through those 6 600 doses -- after they became aware that there was 7 a harmful effect of these steroids, then they no 8 longer used it. 9 So Your Honor, we would argue that the 10 conscious disregard aspect of a punitive damages 11 claim simply does not exist here. Thank you. 12 THE COURT: Thank you. 13 MR. SULLIVAN: Your Honor, may I retrieve the 14 podium over here? 15 THE COURT: Sure, if you want it. 16 MR. SULLIVAN: Sorry. 17 THE COURT: That's the reason we don't use it. 18 I'll allow you, Mr. Sullivan, as has already been 19 done. Is Mr. Sexton going to be involved in this 20 or anybody or just you? 21 MR. SULLIVAN: Just me, Your Honor. 22 THE COURT: All right. And Mr. Shaw, are you 23 going to be desirous of participating in this 24 aspect at all?</p>
<p style="text-align: right;">58</p> <p>1 meningitis cases, they all occurred in the fall of 2 2012. This is when, when the tainted batch of 3 steroid was distributed by NECC. 4 And what was the response to that? It was to 5 stop injecting. When they became knowledgeable, 6 when they became knowledgeable that this steroid 7 was tainted, they didn't continue to inject. 8 That's when they became knowledgeable, and if they 9 had moved forward and continued to inject, then 10 there would be a conscious disregard. 11 This Plaintiff claims there were over 600 12 doses that were ordered by Insight for this 13 particular facility. We don't have 600 cases. 14 Which dose -- I mean when does the doctor's 15 knowledge become triggered, so that they can have a 16 conscious disregard? Which dose is the one that's 17 tainted that's going to injure somebody? The 18 doctors cannot know that. It's absolutely 19 impossible for the doctors to be able to discern 20 what is going to be the harmful lot of steroid, so 21 they can consciously inject that in someone with 22 knowledge that they would be injured. 23 That's just not this case. Once they became 24 aware that there was an adulterated product, it was</p>	<p style="text-align: right;">60</p> <p>1 MR. SHAW: No, Your Honor. 2 THE COURT: All right. I would assume not, 3 but I thought it best to ask. And also, Counsel, 4 where are we on all these -- Have you all appeared 5 in all these files? Everybody has appeared? 6 MR. SEXTON: Yes, of the 11 that you read out. 7 THE COURT: Right, okay, and including the one 8 you, that I didn't read out that you mentioned? 9 MR. SEXTON: Right. 10 THE COURT: All right. 11 MR. SULLIVAN: May it please the Court, Your 12 Honor; my name is Dan Sullivan. 13 THE COURT: I know who you are. Just go 14 ahead. 15 MR. SULLIVAN: Thank you. We're here today, 16 Your Honor, about a case in which these Defendants 17 injected Mr. Wingate with an adulterated drug, and 18 12 days later after a series of strokes and 19 seizures he was mercifully dead. 20 Today the local doctors and their clinic are 21 seeking to discharge four counts -- well, three 22 counts and the punitive damages claim. 23 We received their brief in this demurrer in 24 late February. We sent them our response on March</p>

<p style="text-align: right;">61</p> <p>1 18, and just this Wednesday we received a second 20 2 page brief two days before the hearing. 3 The first challenge I'd like to address is the 4 Virginia Consumer Protection Act. I'll refer to it 5 as the VCPA, if that's all right with Your Honor. 6 Now, Defendant's argument on this particular 7 count has morphed a few times in their multiple 8 briefs. They stated in their demurrer, the only 9 grounds stated in their demurrer is, I quote, that, 10 "The formulation, compounding and sale of drugs is 11 authorized under the federal, under various federal 12 and state laws." 13 Now it's not just the formulation, compounding 14 and sale of drugs. Now they're saying and really 15 their only argument now is that it's the 16 prescribing, dispensing and administering drugs is 17 authorized under Virginia Code Section 54.1-3408. 18 Your Honor, that ground for their demurrer 19 doesn't appear anywhere in the actual demurrer. 20 And as Your Honor is aware, under Virginia Code 21 8.01-273 no grounds other than those stated 22 specifically in the demurrer shall be considered by 23 the Court. 24 A demurrer may be amended, as may any other</p>	<p style="text-align: right;">63</p> <p>1 of whether Your Honor chooses to strike that 2 argument as not being contained within their 3 original demurrer, it's a faulty argument 4 regardless. 5 Your Honor, the Defendants have demurred, 6 saying that 59.1-199(A) excludes prescribing, 7 administering and dispensing a drug. The problem 8 with this is that they're referring to the overall 9 transaction level. They're saying the focus of 10 199(A) is the overall transaction in which we 11 injected this adulterated drug into Mr. Wingate for 12 payment. They're focusing on the transaction 13 itself. 14 Now, you didn't hear them quote 199(A), so if 15 you don't mind, I'll do that right now. It states, 16 "Nothing in this chapter shall apply to any aspect 17 -- any aspect -- of a consumer transaction, which 18 aspect is authorized under laws or regulations of 19 this Commonwealth of the United States." 20 So we see the word "aspect" emphasized and 21 repeated in the very first sentence of this 22 statute, Your Honor. In other words, the Virginia 23 Legislature is saying we don't want you to focus on 24 the entire transaction. We don't want you to focus</p>
<p style="text-align: right;">62</p> <p>1 pleading, but they haven't done that. Again, let 2 me just point out that formulating, compounding and 3 selling the drug, in other words, making a drug or 4 selling a drug, are completely different in kind 5 than prescribe -- 6 THE COURT: You're saying that they didn't 7 comply with Rule 415 in the last submission anyway. 8 MR. SULLIVAN: Yes, Your Honor. So we would 9 move to strike their entire last brief from 10 consideration and the arguments made, most of which 11 were made to the -- 12 THE COURT: So do you want me to set this over 13 to a later date, so that would be timely and we 14 could deal with their, have this argument later? 15 MR. SULLIVAN: I'll defer to -- 16 THE COURT: No, you're handling it. You can 17 decide. 18 MR. SULLIVAN: No, Your Honor. 19 THE COURT: All right. Go ahead. 20 MR. SULLIVAN: We would also move to strike 21 any grounds that are not stated in their demurrer 22 for the Virginia Consumer Protection Act. It's 23 essentially that prescribing, dispensing and 24 administering drugs is authorized. But regardless</p>	<p style="text-align: right;">64</p> <p>1 on the injection of this adulterated drug. We want 2 you -- in exchange for payment. We want you to 3 focus on the aspects of the transaction that are 4 challenged under the VPCA. 5 And indeed, we're not challenging the entire 6 transaction under the VCPA. The aspects of the 7 transaction that Mrs. Wingate is challenging, as 8 she has said repeatedly from her complaint through 9 all of her briefing, is that they misrepresented 10 the drug in medical records, bills, and a handout 11 or handouts across these several cases. 12 Those are the aspects. And even taking a step 13 back from the malfeasance, as Mr. Gardner states, 14 even if you take a step back from the actual 15 malfeasance, think of it from this point; the 16 aspect of the transactions that we challenge are 17 handouts which state what drug you're receiving, 18 bills which state what drug you received, and 19 medical records wherein the doctor states I gave 20 him this drug. 21 Those are the aspects of the transaction that 22 violate the VCPA, Your Honor, and those are the 23 aspects of the transaction that 199(A) focuses on. 24 They have not pointed to any statute that</p>

<p style="text-align: right;">65</p> <p>1 authorizes any one of those things. Doctors have 2 been writing medical records and using them to 3 treat patients since a doctor in ancient Greece 4 coined the Hippocratic Oath, Your Honor. They do 5 it to treat patients and to track treatment, not 6 because the statute says you can use medical 7 records in your treatment. That is the aspect that 8 is under scrutiny under 199(A). 9 And the same with bills; no statute says you 10 can bill a patient for a drug you've given them. 11 And again with the handout; they have not pointed 12 to any statute that says you may or must hand out 13 literature to your patients telling them what drug 14 they're receiving. That's because none exists, 15 Your Honor. 16 Now, even if you set aside the incorrect 17 focus, and again, they're focusing on the overall 18 transaction for the purposes of 199(A), when it 19 says twice in the first sentence it's the aspect of 20 the challenged transaction. 21 Even if you set aside the incorrect focus, 22 Your Honor, the Achilles heel that cripples their 23 argument is that no statute authorizes them to 24 inject Mr. Wingate with an adulterated drug. In</p>	<p style="text-align: right;">67</p> <p>1 something does not meaning authorizing something. 2 That's the argument that the Defendant made in 3 Manassas Auto Cars, and that's quite frankly the 4 argument that the entire defense bar in Virginia 5 was making in the buildup to that case back in 2007 6 and the years prior. 7 They were basically all saying well, this 8 aspect of a transaction -- again aspect -- is 9 heavily regulated, Your Honor. This is a 10 healthcare industry or what may it be, so it's 11 authorized. 12 The Manassas court slapped that argument down, 13 and it was a huge blow to the defense bar. So it's 14 somewhat ironic that the Defendants today are 15 attempting to use Manassas Auto Cars as a sword, 16 when the Court in Manassas Auto Cars specifically 17 held for the plaintiff, and it was a huge blow for 18 the defense bar. 19 So regulating something does not equal 20 authorizing something. And the Defendants claim 21 they've got a statute authorizing the dispensing of 22 an adulterated drug, and again there are several 23 layers of disconnect here. 24 First of all, this wasn't in their original</p>
<p style="text-align: right;">66</p> <p>1 fact, the Virginia Drug Control Act specifically 2 forbids them from injecting Mr. Wingate with a 3 adulterated drug for payment. 4 Section 54.1-3457 of the Virginia Drug Control 5 Act, which Mrs. Wingate has briefed in her 6 complaint and in her briefs, states and I quote, 7 "The following acts shall be prohibited; the 8 manufacture, sale, delivery, holding or offering 9 for sale of any drug, device or cosmetic that is 10 adulterated or misbranded," and again in (3), "the 11 receipt in commerce of any drug, device or cosmetic 12 that is adulterated and the delivery or proffered 13 delivery thereof for pay or otherwise." 14 Injecting someone with an adulterated drug in 15 exchange for payment, the overall transaction is 16 explicitly forbidden by Virginia law, and they're 17 trying to say that it's specifically authorized by 18 Virginia law. That's just not true. So even if 19 you take it from the overall transaction level that 20 they've claimed it to be at, which is incorrect 21 under 199(A), they're wrong. 22 We've heard a few arguments from Mr. Gardner 23 earlier about what the Manassas Auto Cars case 24 means. Here's what it means. It means regulating</p>	<p style="text-align: right;">68</p> <p>1 demurrer. Second of all, it's incorrect focus. 2 Third of all, there's another section that strictly 3 prohibits this very action at the transactional 4 level -- injecting him with an adulterated drug for 5 payment. Even fourth of all, this analysis is 6 incorrect. This statute that they've cited as 7 authorizing or sanctioning actually is a regulating 8 statute, Your Honor. It states, and I quote; 9 "54.1-3408, Professional Use by Practitioners," and 10 this is part of the Virginia Drug Control Act. 11 "A practitioner of medicine," and I will omit 12 all the other forms of medicine, "A practitioner of 13 medicine shall only prescribe, dispense or 14 administer controlled substances, A, in good faith" 15 -- It doesn't say these letter, but -- "A, in good 16 faith; B, for medicinal or therapeutic purposes; 17 and C, within the course of his professional 18 practice." 19 In other words, practitioners of medicine may 20 only dispense these drugs. That's, we'll call that 21 X. They may only dispense this drug when A, B and 22 C are, they check the boxes on A, B, and C. And 23 that's exactly, Your Honor, the type of regulation 24 that was referred to in the Manassas Auto Cars.</p>

<p style="text-align: right;">69</p> <p>1 Mr. Gardner stated today, using a fairly</p> <p>2 colorful example, that he can go and advertise a</p> <p>3 car without running afoul of Virginia law. Well,</p> <p>4 he can advertise one car, but he can't advertise</p> <p>5 more than five cars in one location, because in</p> <p>6 order to do so you need licensing under the very</p> <p>7 statutory scheme that was at issue in Manassas Auto</p> <p>8 Cars.</p> <p>9 They said you can advertise for more than five</p> <p>10 vehicles in more than one location, as long as you</p> <p>11 obtain licensing and other, and other requirements,</p> <p>12 one of which is I believe having a marquee that</p> <p>13 says you sell used cars or whatever. So the point</p> <p>14 is this is a regulated statute, the one that</p> <p>15 they're claiming.</p> <p>16 THE COURT: Let me, and I hate to interrupt</p> <p>17 you, but let me interrupt you. I didn't restrict</p> <p>18 them on time, and I'm not going to restrict you on</p> <p>19 time.</p> <p>20 The simple reality is I have a docket in</p> <p>21 Roanoke County. Since I presently preside in</p> <p>22 Roanoke County and the City of Salem and Roanoke</p> <p>23 City, sometimes I have days when I'm in two</p> <p>24 different places. This is one of those.</p>	<p style="text-align: right;">71</p> <p>1 MR. SULLIVAN: So two last, there are really</p> <p>2 just two -- Okay, so just to briefly recap. One;</p> <p>3 the grounds that they basically based their entire</p> <p>4 argument today on are not included in their</p> <p>5 demurrer, and therefore they should be stricken.</p> <p>6 Two; they're focused on the wrong aspect of</p> <p>7 the transaction. In fact, they're focused on the</p> <p>8 global transaction, which is injecting Mr. Wingate</p> <p>9 with an adulterated drug for payment. 199(A) says</p> <p>10 it's the aspect of the transaction in question.</p> <p>11 Three, they're incorrect that, well, they're</p> <p>12 incorrect that that act in the overall transaction</p> <p>13 is authorized. In fact, it's prohibited strictly</p> <p>14 by Virginia law to inject someone with an</p> <p>15 adulterated drug for payment. It's strictly</p> <p>16 prohibited, so there's no argument that that is</p> <p>17 authorized by law.</p> <p>18 And four, even if that statute didn't exist,</p> <p>19 3408 is the regulating statute. It says you can do</p> <p>20 A or you can do X, which is as a practitioner of</p> <p>21 medicine dispense or prescribe a drug when you</p> <p>22 check the box on B, doing so in good faith, C, for</p> <p>23 medicinal purposes, and D, in the course of your</p> <p>24 professional practice. And I mutilated the</p>
<p style="text-align: right;">70</p> <p>1 I will come back this afternoon after I finish</p> <p>2 that docket. I should be back I anticipate around</p> <p>3 3:30, and request that you take up any further</p> <p>4 argument at that time.</p> <p>5 I hate to do that to you, but I want to give</p> <p>6 you time to complete your argument. But I just,</p> <p>7 I'm out of time, almost out of time this morning.</p> <p>8 So I don't want to work any inconvenience on</p> <p>9 you. As I say, if I had been able to anticipate or</p> <p>10 been aware ahead of time exactly how long each side</p> <p>11 needed, I would have allocated time evenly and held</p> <p>12 everybody to it.</p> <p>13 But I don't like to do that, so I rarely,</p> <p>14 rarely do that. And I'm not going to, I won't cut</p> <p>15 your argument time, I'm just going to bifurcate</p> <p>16 here. But I want to give you enough time to kind</p> <p>17 of conclude for now, without making any awkward</p> <p>18 transitions later, or if you can conclude now.</p> <p>19 MR. SULLIVAN: I can make an attempt to get</p> <p>20 moving, if you just cut me off --</p> <p>21 THE COURT: No, I'm not trying to rush you.</p> <p>22 MR. SULLIVAN: If you don't mind, I'll just</p> <p>23 finish up the VCPA.</p> <p>24 THE COURT: That's fine.</p>	<p style="text-align: right;">72</p> <p>1 headings, and I apologize for that.</p> <p>2 Lastly, just two last things on this, and then</p> <p>3 I can go real briefly into the damages argument.</p> <p>4 First of all -- and excuse me, just one last thing,</p> <p>5 and that's that the VCPA is a remedial statute,</p> <p>6 Your Honor, meaning that an exclusion such as</p> <p>7 199(A) is meant to be construed strictly. And the</p> <p>8 Defendant's argument would balloon the exclusion to</p> <p>9 swallow the rule. In other words, any transaction</p> <p>10 -- not any aspect of the transaction, but any</p> <p>11 transaction that's authorized, which this one is</p> <p>12 not -- would then be excluded.</p> <p>13 As for the damages, Your Honor, this is</p> <p>14 statutory interpretation 101. Actual damages, the</p> <p>15 term "actual damages" is not in any way defined or</p> <p>16 limited in the VCPA anywhere. Therefore, we assume</p> <p>17 that the Virginia Legislature when it enacted the</p> <p>18 VCPA in 1977 was aware of and amenable to existing</p> <p>19 case law at the time.</p> <p>20 The Virginia court in 1937 said actual damages</p> <p>21 includes all damages that flow from injury. Those</p> <p>22 would include personal injury damages. This would</p> <p>23 include emotional anguish for loss of Mr. Wingate</p> <p>24 by his family members. They've not made one</p>

<p style="text-align: right;">73</p> <p>1 argument that that's a faulty interpretation of the</p> <p>2 statute. Instead they quibble about the stare</p> <p>3 decisis principles.</p> <p>4 Your Honor, I would argue just briefly to</p> <p>5 that. If one court holds exactly one way on a</p> <p>6 particular issue and then 10 years later the exact</p> <p>7 same court revisits the exact same issue, cites the</p> <p>8 prior case and says we choose to hold the exact</p> <p>9 opposite position in this case, I would argue</p> <p>10 that's overturning the prior case's law.</p> <p>11 THE COURT: But that's in a circuit. Those</p> <p>12 are court cases, aren't they?</p> <p>13 MR. SULLIVAN: They're circuit court.</p> <p>14 THE COURT: So it's not stare decisis on me</p> <p>15 anyway, is it?</p> <p>16 MR. SULLIVAN: No.</p> <p>17 THE COURT: Only to the extent it's</p> <p>18 persuasive. So none of that really matters to me,</p> <p>19 does it?</p> <p>20 MR. SULLIVAN: You've made my argument better</p> <p>21 than me. Thank you.</p> <p>22 Essentially they don't give any reason why the</p> <p>23 older cases they cited which don't provide any</p> <p>24 reason for this new definition of actual damages</p>	<p style="text-align: right;">75</p> <p>1 none of this was noticed for today.</p> <p>2 THE COURT: I'm sorry, that's why I was asking</p> <p>3 you earlier if you wanted to be -- Yeah,</p> <p>4 absolutely. Of course I'll allow you to respond.</p> <p>5 I just thought you were not desirous of argument</p> <p>6 today.</p> <p>7 MR. SHAW: No, certainly not. As I removed</p> <p>8 the case today, I was not prepared to --</p> <p>9 THE COURT: Well, on that case.</p> <p>10 MR. SHAW: Right, because --</p> <p>11 THE COURT: Well, I'm not dealing with, I'm</p> <p>12 not doing anything with that case.</p> <p>13 MR. SHAW: Right. Understandably this was</p> <p>14 noticed, this whole argument today was noticed in</p> <p>15 the Wingate case, and the Court has kindly allowed</p> <p>16 everybody to put forth their arguments.</p> <p>17 THE COURT: I thought we'd just get to it, to</p> <p>18 the extent we can.</p> <p>19 MR. SHAW: We would want to have the same</p> <p>20 opportunity to respond, once we get the transcript.</p> <p>21 Thank you.</p> <p>22 THE COURT: Sure. And I don't, I don't</p> <p>23 typically, because I haven't found it necessary,</p> <p>24 and I think it unintentionally oftentimes infringes</p>
<p style="text-align: right;">74</p> <p>1 that don't mean what it's meant since the 1930s is</p> <p>2 a better definition than the one we just stated and</p> <p>3 those in Mrs. Wingate's brief. And as Mr. Gardner</p> <p>4 said, she has claimed continuing damages</p> <p>5 regardless.</p> <p>6 So we would respectfully request that you</p> <p>7 overrule their demurrer on both of these aspects of</p> <p>8 the Virginia Consumer Protection Act. And if it's</p> <p>9 all right with Your Honor, we can stop and continue</p> <p>10 later on. Otherwise, if you have more time we'll</p> <p>11 continue on.</p> <p>12 THE COURT: No. All right. Mr. Shaw?</p> <p>13 MR. SHAW: I'm sorry; we're going to reconvene</p> <p>14 at 3:30 here?</p> <p>15 THE COURT: I'll excuse you. You don't have a</p> <p>16 dog in this fight at this stage, I don't think.</p> <p>17 I've already said all I'm going to hear is the rest</p> <p>18 of his argument. I'm going to order or have you</p> <p>19 all order or Miss Reynolds order the transcript on</p> <p>20 the argument as to the demurrers, and of course you</p> <p>21 can get a copy of that, if you like.</p> <p>22 MR. SHAW: And then be permitted to respond.</p> <p>23 THE COURT: I'm sorry?</p> <p>24 MR. SHAW: Be permitted to respond, because</p>	<p style="text-align: right;">76</p> <p>1 on lawyers' schedules and workload and whatnot. So</p> <p>2 if I start drawing lines, invariably either people</p> <p>3 will not say that it chafes given their trial</p> <p>4 schedule or otherwise, or they say it does and I've</p> <p>5 got to go back and revisit everything and get</p> <p>6 involved in a lot of details and nuances I don't</p> <p>7 want to get involved in.</p> <p>8 So I typically don't set any -- What I would</p> <p>9 like is you all just, you know, I don't care</p> <p>10 whether you all send something in at one time or</p> <p>11 whether somebody sends something in and somebody</p> <p>12 else responds. I don't want, you know, something</p> <p>13 sent in 60 days and something else in four months</p> <p>14 and something else ten months after that, and then</p> <p>15 we're going to be talking about continuing the</p> <p>16 trial date.</p> <p>17 So some reasonable period of time that suits</p> <p>18 everybody. You all work it out. All I ask is once</p> <p>19 everybody's submitted whatever it is you want to</p> <p>20 submit, let me know; otherwise the file won't be</p> <p>21 brought to my attention, and then you'll be</p> <p>22 wondering and your clients will be wondering why</p> <p>23 you haven't got a ruling.</p> <p>24 Just let me know when it's all in, and I'll</p>

<p style="text-align: right;">77</p> <p>1 hear and say. Given your travel distance and 2 whatnot, you're excused. I'm sorry to bifurcate 3 things like this, but that's just my present world. 4 MR. SHAW: So the Court has ruled we'll get a 5 copy of the transcript? Miss Reynolds is ordering? 6 THE COURT: I don't rule on copies of 7 transcripts. You all order transcripts and get 8 them. 9 MR. SHAW: Got it. Yes. 10 THE COURT: Yeah. And I know I'm sure things 11 are done differently the further north you get, but 12 no. 13 MR. SHAW: I understand. 14 THE COURT: Miss Stiles will prepare it, and 15 anybody who wants it can get it. Anybody sitting 16 in the audience can get it, as long as you pay for 17 it. I don't pay for it, and I don't ordinarily ask 18 for them, except when I want them -- but I want 19 them in this case. 20 MR. SHAW: Thank you, Your Honor. 21 THE COURT: Certainly. Now, for purposes of 22 where we are right now; Miss Reynolds and Mr. 23 Gardner, likewise, although I realize you may wish 24 to appear and respond further to whatever Mr.</p>	<p style="text-align: right;">79</p> <p>1 just finished discussing the damages aspect on the 2 VCPA claim. I just had one other thing to add to 3 that. 4 While Mr. Gardner was discussing this issue he 5 mentioned, well, he argued that our approach forces 6 the VCPA to trump the wrongful death statute. And 7 that's just not true, Your Honor. The wrongful 8 death statute is our vehicle for recovery of 9 damages. It would be VCPA is our, that's our 10 claim. That's our cause of action. 11 And so because actual damages in a case that 12 involves a death, just as you'll find in Humphrey, 13 the Humphrey case from Fairfax County court, in 14 that case it was a wrongful death as well. And I 15 believe just for edification purposes they have a 16 good discussion of this issue in there. 17 The other thing is that the rest of these 18 cases though, which were nominal and we're here on 19 it now, is none of those wrongful death statutes 20 apply to any of those. So that entire argument 21 does not cover any of the rest of these cases, 22 since these aren't death cases. 23 Moving forward to the gross negligence claim; 24 Your Honor, it's impossible to believe that the</p>
<p style="text-align: right;">78</p> <p>1 Sullivan concludes with, you don't have to. I will 2 excuse you. 3 Again, it's a fairly lengthy recess, so I 4 don't want to impose on your schedules needlessly. 5 And I hate to impose on your schedule, Mr. 6 Sullivan. I excuse you as well, Mr. Sexton. Or 7 Mr. Sexton, if you don't want to make the rest of 8 the argument, I'll hear Mr. Sullivan. But it'll be 9 around 3:30. I'll do the best I can. Thank you 10 all. Stand in recess. 11 MR. GARDNER: Thank you, Your Honor. 12 THE BAILIFF: Court stands in recess. 13 14 (A recess was taken at 12:06 p.m., and the 15 hearing resumed at 3:45 p.m. All Counsel were present, 16 excluding Mr. Shaw.) 17 18 THE COURT: All right. Following recess, show 19 the presence of Plaintiff's Counsel and Counsel, 20 Mr. Gardner and Miss Reynolds. Mr. Shaw has been 21 excused. 22 Mr. Sullivan, again, thank you. I apologize 23 for having interrupted. You may proceed. 24 MR. SULLIVAN: Thank you, Your Honor. We have</p>	<p style="text-align: right;">80</p> <p>1 facts of the case as we pled them cannot constitute 2 gross negligence. You have -- we have the 3 Defendants here saying essentially the following. 4 Dr. O'Brien walks into a room. There's a 5 needle sitting on a table. He's never seen before. 6 He didn't draw the needle, he didn't draw the 7 syringe, he didn't look at the vial, he had nothing 8 to do with it. All he knows is that there's a 9 needle sitting there. He doesn't know who drew it, 10 and all he can tell is it's some sort of aqueous 11 solution inside the syringe. 12 He proceeds to then inject it into his 13 patient, essentially hoping for the best but 14 shooting blind, Your Honor. And that is their best 15 case scenario of what these doctors did. 16 Meanwhile, in not supervising whoever it was 17 that chose these drugs and whoever it was that 18 filled these drugs with or filled -- excuse me -- 19 filled these syringes with the drugs in question, 20 the doctors delegated a vital medical decision to 21 unsupervised personnel. 22 They're unsupervised because the doctors don't 23 know who put them in there, so they couldn't be 24 supervised, and they therefore are violating</p>

<p style="text-align: right;">81</p> <p>1 Virginia regulations 18 VAC 85-20-29, which says</p> <p>2 that, "Practitioners shall delegate patient care</p> <p>3 only to subordinates who are properly trained and</p> <p>4 supervised."</p> <p>5 And again, that's the doctor's best case</p> <p>6 scenario, Your Honor. The other scenario is that</p> <p>7 they are the ones acting as medical director, in</p> <p>8 Dr. Mathis' case, acting as medical director,</p> <p>9 choosing these drugs, purchasing them directly from</p> <p>10 NECC, and pawning them off as a Pfizer, the gold</p> <p>11 standard of sterility, Your Honor, of</p> <p>12 pharmaceuticals.</p> <p>13 And just one brief bit about this talk that</p> <p>14 somehow we in our complaint, that Miss Wingate</p> <p>15 alleges that the doctors did not know about these</p> <p>16 situations. That's simply not true. The</p> <p>17 allegations in the complaint and the allegations</p> <p>18 which span dozens of paragraphs state, "Upon</p> <p>19 information and belief, Drs. Mathias and O'Brien</p> <p>20 would allege."</p> <p>21 So what we're alleging is that they will</p> <p>22 allege these facts. We're not actually giving</p> <p>23 those facts as Mrs. Wingate's pleadings or as her</p> <p>24 allegation. So when Mrs. Wingate says that, she's</p>	<p style="text-align: right;">83</p> <p>1 didn't receive.</p> <p>2 Insight Health Corp. has denied those</p> <p>3 allegations and essentially says we bought your</p> <p>4 practice in late 2010. You guys were doing this</p> <p>5 stuff when we got here. You're the only ones in</p> <p>6 the country that we know that provide this service.</p> <p>7 So we've got both Defendants pointing fingers</p> <p>8 at each other, Your Honor, which essentially proves</p> <p>9 the prudence of Mrs. Wingate in pleading these</p> <p>10 facts in the alternative.</p> <p>11 As for this argument about the onerous duty</p> <p>12 that Mrs. Wingate would force upon all healthcare</p> <p>13 providers to establish their own labs, their own</p> <p>14 testing labs in their own facilities and test and</p> <p>15 open up these vials and test them themselves; Your</p> <p>16 Honor, none of that is necessary. None of that is</p> <p>17 anywhere said in any of the pleadings or briefs</p> <p>18 that Mrs. Wingate has filed. It's purely a straw</p> <p>19 man argument.</p> <p>20 What Mrs. Wingate is asking or is saying that</p> <p>21 these doctors should have done was exercise the</p> <p>22 least bit of diligence in ensuring that what was</p> <p>23 being injected into the most delicate space in the</p> <p>24 human body of their patient had some assurance of</p>
<p style="text-align: right;">82</p> <p>1 anticipating the doctors' argument.</p> <p>2 She's not claiming that all those facts inside</p> <p>3 there are true. So therefore when she makes these</p> <p>4 claims, these factual claims about all parties and</p> <p>5 includes the doctors in them, that's alternative</p> <p>6 pleading, Your Honor.</p> <p>7 While Mr. Gardner provides a colorful</p> <p>8 description of the complaint and essentially claims</p> <p>9 that there's too much detail, there's too much in</p> <p>10 there, the fact is that the complaint clearly sets</p> <p>11 out that these Defendants, if the facts as alleged</p> <p>12 in the complaint are taken to be true, which they</p> <p>13 must for the purposes of the demurrer, that these</p> <p>14 Defendants are responsible for choosing these drugs</p> <p>15 and for pawning them off as the Pfizer drug, and</p> <p>16 for billing people for the Pfizer and/or the Teva</p> <p>17 Parenteral drug.</p> <p>18 Again, and it's a good thing Mrs. Wingate did</p> <p>19 plead in the alternative, Your Honor, because now</p> <p>20 both Defendants have crossed -- well, the local</p> <p>21 Defendants have cross-claimed against the doctor --</p> <p>22 against the Insight Health, saying that you were</p> <p>23 the one that made these decisions. You were the</p> <p>24 one that decided to bill people for a drug they</p>	<p style="text-align: right;">84</p> <p>1 sterility and quality.</p> <p>2 And while Mr. Gardner does also state that no</p> <p>3 court in the country requires these sorts of</p> <p>4 duties, he's not given any case law to support that</p> <p>5 allegation. I'm not sure what that is.</p> <p>6 Fraud, Your Honor; the fraud defense or the</p> <p>7 fraud demurrer from these Defendants essentially</p> <p>8 says you can't prove that we gave you this</p> <p>9 information. We did give you false information.</p> <p>10 We did give Mrs. Wingate false information. We</p> <p>11 gave his insurance company false information. We</p> <p>12 gave his primary care physician false information.</p> <p>13 You can't approve at the stage of a demurrer</p> <p>14 that he received this information before he</p> <p>15 received his injection. Therefore, according to</p> <p>16 their argument, you can't have a fraud claim.</p> <p>17 Your Honor, inherent in any fraud claim is the</p> <p>18 idea that the Defendants have already practiced</p> <p>19 deception. And Mr. Wingate, we would ask him if he</p> <p>20 received the handout telling him that he was</p> <p>21 getting a Pfizer drug before the injection, but</p> <p>22 he's dead, Your Honor.</p> <p>23 So we're forced with what the Defendants have</p> <p>24 given us, and at that point -- this point we're at</p>

<p style="text-align: right;">85</p> <p>1 the outset of discovery. We don't have any 2 information on that, when he discovered. Your 3 Honor, if he received -- And they've said 4 themselves in their last brief that for all the 5 Defendants know and today Miss Reynolds restated 6 for all these defendants know, Mr. Wingate received 7 this handout saying you're getting Depo-Medrol as 8 he was walking out the door or from some brochure. 9 Well, it's just as likely, Your Honor, that he 10 received it while he was sitting in the waiting 11 room, waiting to get an injection. If he had a 12 smartphone you could look up Depo-Medrol on there. 13 But it's pure speculation on the part of both 14 sides, at this point. The fact is we're at the 15 outset of discovery, and it's simply too soon to 16 sustain a demurrer simply because the Plaintiff has 17 not constructed a detailed second by second 18 timeline of when he received this handout. 19 But Your Honor, there is a very disturbing 20 aspect to this case, in addition to what I've just 21 discussed. It's very hard to believe that a 22 national corporation and a local, respected local 23 clinic would engage in a sweeping pattern of 24 deception to trick the gatekeeping insurers and</p>	<p style="text-align: right;">87</p> <p>1 The question is why would they do this. The answer 2 is very simple: Money, your Honor. The -- 3 THE COURT: Did you allege that too? 4 MR. SULLIVAN: We did, Your Honor. 5 THE COURT: Okay. 6 MR. SULLIVAN: What we have and what we, what 7 Mrs. Wingate did include in her -- excuse me for a 8 moment -- what she did include in her complaint is 9 a statement from Anthem, her husband's insurer, 10 that says, "Due to the lack of, due to the lack of 11 data to adequately review the compounded 12 medications, compounded medications are considered 13 nonpreferred and are placed at the highest coverage 14 here; i.e., highest co-pay or coinsurance for 15 nonformulary medication. They may also require 16 prior authorization of benefits for coverage 17 through a participating network pharmacy." 18 Your Honor, what that means is that the 19 Defendants would have had to call Anthem up, say 20 Anthem, we are going to inject Mrs. Wingate with a 21 compounded drug. Will you pay for this? Do you 22 give us authorization to do so -- prior to the 23 injection. 24 But that would have involved a lot of work,</p>
<p style="text-align: right;">86</p> <p>1 primary care physician into allowing them to 2 provide patients with a substandard compounded drug 3 and bill them for an FDA approved Pfizer drug, or 4 it's also FDA approved generic copy made by Teva 5 Parenteral, but that's the facts we have, Your 6 Honor. We've reviewed over 30 patients' files. 7 Your Honor, in each and every one of them -- 8 THE COURT: But none of this deals with facts, 9 does it? Isn't it all on demurrer? 10 MR. SULLIVAN: Well, many of these facts, the 11 facts that we have here are that in these cases, 12 Your Honor, we have alleged that they uniformly -- 13 THE COURT: What you've alleged is what's 14 important, not the investigation you've done. 15 That's my point. 16 MR. SULLIVAN: Sure. 17 THE COURT: I don't need to hear about the 18 investigation. Tell me what you've alleged. 19 MR. SULLIVAN: We've alleged in all ten of 20 these cases that we're dealing with right now, 21 every single one of them it's the same factual 22 situation, and that's that these Defendants 23 uniformly miscoded this drug. 24 And this isn't just an accident, Your Honor.</p>	<p style="text-align: right;">88</p> <p>1 Your Honor, and Anthem probably would have said no. 2 So what they did instead is they didn't say 3 anything. They withheld that information before 4 the injection, and they misrepresented it after. 5 They told Anthem and they told these doctors 6 that we've provided this patient with a Pfizer 7 drug, or in other circumstances, we've provided 8 this patient with the FDA approved generic of the 9 Pfizer drug. 10 So you have a pattern of deception, you have a 11 motive. So the question is, Your Honor -- And we 12 acknowledge this is an issue of first impression 13 under Virginia law, this fraud by intermediary. 14 But what we have is the question of whether 15 Virginia law, if it's okay for these insurance 16 companies to lie to everyone and for these 17 Defendants to lie to everyone, lie -- If I said 18 insurance companies, which I'm pretty sure I did, 19 that's not what I meant -- if it's okay for these 20 Defendants to lie to insurance companies, which are 21 the gatekeepers for these patients, to lie to the 22 patient's doctors who are also the gatekeepers, and 23 engage in that pattern on a massive scale for 24 literally years, as long as they don't do so, as</p>

<p style="text-align: right;">89</p> <p>1 long as they don't provide mr. Wingate himself with 2 a statement that he could rely on before he is 3 done, is it okay under Virginia law. We would 4 submit this is exactly the sort of case where the 5 fly by intermediary theory should be considered in 6 Virginia. 7 Your Honor, fraud by intermediary isn't some 8 newfangled plaintiff's bar idea. It comes from the 9 Second Restatement of Torts, and it's been applied 10 in jurisdictions across the country. While Miss 11 Reynolds is correct that no Virginia case or court 12 has accepted it, no Virginia court that the 13 Plaintiffs have been able to locate has rejected it 14 either. 15 THE COURT: That's what case of first 16 impression means, doesn't it? 17 MR. SULLIVAN: It is. I just wanted to be 18 clear. 19 THE COURT: All right. I just want to let you 20 know I do understand some things. 21 MR. SULLIVAN: Your Honor, the facts will come 22 out in discovery. They claim in their demurrer for 23 all we know he got it on the way out, for this 24 handout.</p>	<p style="text-align: right;">91</p> <p>1 MR. SULLIVAN: Your Honor, we would submit 2 that's conscious disregard of your patient's 3 rights. Thank you. 4 THE COURT: And on the issues other than the 5 punitive damage and fraud issues, do you agree or 6 concede that if the demurrer is granted, that 7 there's no need to replead, because you've pled 8 everything that could be pled? It's just a 9 question that it's not sufficient? 10 MR. SULLIVAN: Your Honor, we believe we've 11 adequately pled our argument. 12 THE COURT: That's what I'm saying. So you 13 wouldn't need leave to replead, if the demurrer was 14 sustained? 15 MR. SULLIVAN: I don't believe so. 16 THE COURT: All right. I think that's right. 17 All right. 18 I don't really want to hear a whole lot, but 19 Mr. Gardner or Miss Reynolds; and I'm sorry, Mr. 20 Gardner, but since you've switched positions on me 21 where he's closer, where I would normally assume 22 lead counsel was. In any event, if either of you, 23 or given the way we've done today, if both of you 24 want to briefly respond, I'll certainly permit</p>
<p style="text-align: right;">90</p> <p>1 The facts will come out in the discovery, and 2 we would submit this is the type of case where a 3 demurrer is simply not appropriate, especially 4 where they have the option for a motion to strike 5 the evidence or a motion for summary judgment at a 6 later time. 7 Lastly, Your Honor, we come to the punitive 8 damages argument. Essentially the Defendants -- 9 THE COURT: If you've got fraud, you've got 10 punitives, don't you? 11 MR. SULLIVAN: Exactly. The Defendants are 12 arguing -- I want to address one thing. The 13 Defendants are arguing that somehow they need to 14 have conscious disregard, and that means they need 15 to have known that these drugs were adulterated. 16 And that's simply not true. 17 What we've alleged is that these Defendants 18 knew they were purchasing -- these Defendants, 19 that's in the allegations, knew they were 20 purchasing drugs from a cut rate, illegal, 21 sprawling pharmacy surrounded by a dump that shreds 22 used mattresses from prisons and hospitals, Your 23 Honor. 24 THE COURT: Yeah, I've heard about all that.</p>	<p style="text-align: right;">92</p> <p>1 that. 2 MR. GARDNER: I won't need that. Thank you. 3 I got a promotion in the interim. 4 THE COURT: Good for you. Battle field 5 promotions are always good. 6 MR. GARDNER: Very quickly, in regard to the 7 argument that our stance has shifted from the 8 filing of our demurrer to the argument or reply; in 9 the motion we say that, "The Virginia Consumer 10 Protection Act excludes from provisions any aspect 11 of consumer transaction which is authorized under 12 the laws and regulations of the laws of the 13 Commonwealth of Virginia in the United States," and 14 we cite to the Virginia Drug Control Act 54.1-3400, 15 that set. 16 In our brief in support we say that, "The 17 formulation, compounding, and sale of drugs are 18 sanctioned under Virginia and federal law, and 19 therefore excluded under the VPCA," and then he 20 quotes the language of that exact provision where 21 we say that, "A practitioner of medicine shall only 22 prescribe, dispense or administer controlled 23 substances in good faith for medicinal or 24 therapeutic purposes, during the course of his</p>

<p style="text-align: right;">93</p> <p>1 professional practice."</p> <p>2 And then in our reply we state that the proper</p> <p>3 determination for the Court is whether the</p> <p>4 prescription, administration and dispensing of</p> <p>5 drugs is sanctioned by Virginia or federal law.</p> <p>6 If that constitutes inconsistent pleading, I'm</p> <p>7 going to have a very hard time writing briefs in</p> <p>8 the future. I think that we put it in issue in the</p> <p>9 motion, we raised it in our initial brief, we</p> <p>10 continue that argument in our reply, as applied to</p> <p>11 the response the Plaintiff made.</p> <p>12 Now, I think the real issue with this argument</p> <p>13 is how do we define the transaction at issue, for</p> <p>14 the purposes of the exclusionary language of the</p> <p>15 Virginia Consumer Protection Act. They want to</p> <p>16 focus on a very discrete aspect, citing the</p> <p>17 language that any aspect of a consumer transaction</p> <p>18 which aspect is authorized under separate statutes</p> <p>19 is excluded. They say we are focusing too broadly,</p> <p>20 that we look at the whole transaction, and that we</p> <p>21 need to focus more narrowly.</p> <p>22 I say that we just look at what the Virginia</p> <p>23 Supreme Court has done in the only case where they</p> <p>24 consider this provision, Manassas Auto Cars v.</p>	<p style="text-align: right;">95</p> <p>1 to take the VCPA and trump the Wrongful Death Act;</p> <p>2 we would simply refer to the analysis in the cases</p> <p>3 we cited, both of the cases that we have cited and</p> <p>4 that Plaintiff cited are persuasive authority.</p> <p>5 They're Virginia circuit court cases.</p> <p>6 Our position is they're all good law. It's</p> <p>7 for the Court to decide the best position in the</p> <p>8 split. We've respectfully submitted that the cases</p> <p>9 we've cited are better reasoned, and they make</p> <p>10 clear that their express worry is that the Virginia</p> <p>11 Consumer Protection Act can slowly expand tendrils</p> <p>12 into other aspects in discrete sections of the</p> <p>13 Virginia Code that are meant to be read</p> <p>14 independently. And we would respectfully request</p> <p>15 that the Court sustain the demurrer on those</p> <p>16 grounds. Thank you.</p> <p>17 THE COURT: All right. Gentlemen, if you all</p> <p>18 would get me the portion of the transcript dealing</p> <p>19 with your argument here today and submit anything</p> <p>20 further in conjunction with whatever Mr. Shaw has</p> <p>21 suggested that he wanted to submit, and then one of</p> <p>22 you or all of you or any of you let me know that</p> <p>23 it's, it's ripe and ready for everything you want</p> <p>24 me to have and it's ready for ruling, then I will</p>
<p style="text-align: right;">94</p> <p>1 Couch, and there the complaint alleged fraudulent</p> <p>2 motor vehicle advertising.</p> <p>3 The Court classified the aspect of the</p> <p>4 transaction at issue as pure motor vehicle</p> <p>5 advertising. And I want to make sure that I get</p> <p>6 the exact language, so if you'll just give me two</p> <p>7 seconds. Yes; "motor vehicle dealer advertising,"</p> <p>8 that's how they classified the transaction at</p> <p>9 issue.</p> <p>10 We could go very broadly here. The</p> <p>11 transaction that resulted in the tragedy of Mr.</p> <p>12 Wingate's death and the injuries in all the related</p> <p>13 cases start at the New England Compounding center,</p> <p>14 and it involved a chain of distribution,</p> <p>15 administration and dispensation that ended at the</p> <p>16 clinic in Roanoke.</p> <p>17 We're only focusing on Image Guided Pain</p> <p>18 Management's aspect of that transaction, the</p> <p>19 administration and prescription of the drug, and</p> <p>20 that aspect is authorized by Virginia law as</p> <p>21 described in our earlier brief, and therefore</p> <p>22 excluded from the VCPA.</p> <p>23 And then finally on the VCPA, the notion that</p> <p>24 we are not -- that the Plaintiff is not asking you</p>	<p style="text-align: right;">96</p> <p>1 get you a ruling.</p> <p>2 And with that, then is there anything further</p> <p>3 today, Mr. Sexton, from your viewpoint?</p> <p>4 MR. SEXTON: There's one thing. We did a</p> <p>5 protective order about a month ago and forwarded it</p> <p>6 to Your Honor, and it was endorsed by everybody.</p> <p>7 We were just wondering if you had a problem with it</p> <p>8 or had any questions for us about it.</p> <p>9 THE COURT: If I did, it would have been the</p> <p>10 first time I've ever had a problem with a</p> <p>11 protective order. Take it when it's endorsed. And</p> <p>12 you say you sent --</p> <p>13 MR. SEXTON: Well, Miss Reynolds, she sent it.</p> <p>14 THE COURT: Wait a minute, wait a minute. I'm</p> <p>15 sorry, here's -- Typically what the Clerk does is</p> <p>16 the Clerk places the protective order on the</p> <p>17 outside of the file, so that the clerk's office and</p> <p>18 everyone else can handle it correctly.</p> <p>19 What they've done in this was even though it</p> <p>20 wasn't entered, they placed it on the outside of</p> <p>21 the file. I thought it was entered, but it's</p> <p>22 entered. It's entered as of today.</p> <p>23 MR. SEXTON: Okay.</p> <p>24 THE COURT: Or will be momentarily. And it</p>

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1 was also with the letter where you all were telling
 2 me I couldn't add NECC as a nominal party, and I
 3 wrote back on that. So I think we're all squared
 4 away.

5 Anything further, Mr. Gardner?

6 MR. GARDNER: No, Your Honor.

7 THE COURT: Miss Reynolds?

8 MS. REYNOLDS: No, Your Honor.

9 THE COURT: Mr. Sullivan?

10 MR. SULLIVAN: No, Your Honor.

11 THE COURT: All right. Thank you all. That
 12 concludes the matter for today. We'll stand in
 13 recess.

14
 15 (4:10 p.m.)

16
 17 * * * * *

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CERTIFICATE

COMMONWEALTH OF VIRGINIA

COUNTY OF FRANKLIN

I, Cynthia N. Stiles, CCR, Notary Public in and for the
 Commonwealth of Virginia, at Large, do hereby certify that
 the foregoing hearing was by me reduced to machine shorthand
 in the presence of the witness, afterwards transcribed by me
 by means of computer, and that to the best of my ability the
 foregoing is a true and correct transcript of the hearing as
 aforesaid.

I further certify that this hearing was taken at the
 time and place specified in the foregoing caption.

I further certify that I am not a relative, counsel or
 attorney for either party, or otherwise interested in the
 outcome of this action.

IN WITNESS WHEREOF, I have hereunto set my hand at Rocky
 Mount, Virginia on the 14th day of April, 2013.

 CYNTHIA N. STILES, CCR
 NOTARY PUBLIC

My Commission expires December 31, 2014

Notary Registration Number: 266666

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